Supreme Court, U.S.
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No. 98 ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EDWARD J. SHOEN,
Petitioner,

v.

SAMUEL W. SHOEN, CECILIA M. SHOEN-HANLON, THERESA SHOEN-ROMERO, KATRINA M. SHOEN-CARLSON, MICHAEL L. SHOEN, LEONARD S. SHOEN, SAMWILL, INC., CEMAR, INC., KATTYDID, INC., THERMAR, INC., MICKL, INC., AND L.S.S., INC.,
Respondents.

Petition for a Writ of Certiorari to the Arizona Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the imposition of punitive damages solely on an individual member of a board of directors for collective actions taken by the board as a whole violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

II. Does the imposition of punitive damages based solely on a defendant's "state of mind" without relation to any unlawful conduct by the defendant violate the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioner Edward J. ("Joe") Shoen was petitioner/cross-respondent before the Arizona Supreme Court, appellant/cross-appellee before the Arizona Court of Appeals, and defendant before the Maricopa County Superior Court.

Respondents Samuel W. Shoen, Cecilia M. Shoen-Hanson, Theresa Shoen-Romero, Katrina M. Shoen-Carlson, Michael L. Shoen, Leonard S. Shoen, Samwill, Inc., Cemar, Inc., Kattydid, Inc., Thermar, Inc., Mickl, Inc., and L.S.S., Inc., were respondents/cross-petitioners before the Arizona Supreme Court, appellees/cross-appellants before the Arizona Court of Appeals, and plaintiffs before the Maricopa County Superior Court.

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PETITION FOR A WRIT OF CERTIORARI

Edward J. ("Joe") Shoen petitions for a writ of certiorari to review the judgment and opinion of the Arizona Court of Appeals entered in the above-captioned case on July 24, 1997.

OPINIONS BELOW

The order of the Arizona Supreme Court denying review is not reported and is reprinted in the appendix hereto ("App.") at 24a. The opinion of the Arizona Court of Appeals is not reported and is reprinted at App. 1a. The ruling of the Maricopa County Superior Court is

not reported and is reprinted at App. 65a. The opinion of the Arizona Court of Appeals affirming the denial of a preliminary injunction is reported at 167 Ariz. 58, 804 P.2d 787 and is reprinted at App. 38a. The opinion of the Maricopa County Superior Court denying injunctive relief is not reported and is reprinted at App. 25a.

JURISDICTION

The judgment of the Arizona Court of Appeals was entered on July 24, 1997. The Arizona Supreme Court issued its order denying petitioner's timely petition for review on March 17, 1998. App. 24a. On June 3, 1998, Justice O'Connor granted petitioner's application to extend the time for filing this petition to and including July 15, 1998. App. 75a. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction. The underlying dispute in this case concerned the corporate control of AMERCO, the parent company of U-Haul International, Inc. Petitioner Joe Shoen was the President and Chairman of the six-member AMERCO board of directors when actions taken collectively by the AMERCO board precipitated this litigation by certain AMERCO shareholders—respondents here. After a seven-week jury trial, petitioner, along with the other members of the AMERCO board, was found liable for $1.47 billion in compensatory damages for breach of

fiduciary duty, based on actions that were taken pursuant to the board's unanimous and collective approval. In addition, Joe Shoen alone was found liable for $70 million in punitive damages. After plaintiffs accepted a remittitur ordered by the trial court, these amounts were reduced to $461 million in compensatory damages against all defendants jointly and severally, and $7 million in punitive damages against Joe Shoen alone.

The punitive damages award came after the trial court granted a directed verdict as to punitive damages in favor of all defendants except Joe Shoen, despite the fact that the only conduct supporting liability was collective board action taken on the unanimous vote of all members of the board. The courts below allowed Joe Shoen to be singled out for punitive damages based on his alleged state of mind, which the courts found evidenced not by any unlawful conduct, or indeed by any conduct that was directly related to the board vote which gave rise to the award of compensatory damages, but rather by Joe's tumultuous relationship with his father and one of his siblings. In other words, Joe Shoen, alone among the directors, was found liable for $7 million in punitive damages based on conduct that, standing alone, was not unlawful and which itself caused respondents no injury. The award of punitive damages against petitioner in these circumstances violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and conflicts with this Court's cases.

Facts. In 1988, 97 percent of the stock of AMERCO was owned in roughly equal shares by thirteen different members of the Shoen family—Leonard Samuel ("L.S.") Shoen and his twelve children. App. 2a. The members of the Shoen family could not agree on how AMERCO should be managed, and by the summer of 1988 two factions had developed among the family members. One group of the family—which controlled slightly less than

46 percent of the outstanding shares of the company and included petitioner and his siblings Paul Shoen, James Shoen, Mark Shoen, and Sophia Shoen—was generally not in favor of selling the company. App. 39a. When the pertinent events in this case took place, Paul Shoen and James Shoen, along with Joe Shoen, were also members of AMERCO's six-member board of directors. App. 7a. The other faction of the family, including L.S. Shoen, Sam Shoen, Cecilia Shoen-Hanson, Theresa Shoen-Romero, Katrina Shoen-Carlson, and Michael Shoen—respondents here—wanted to "maximize the liquidity * * * of their stock," *i.e.*, sell the company, and entered into a voting trust agreement to attempt to realize that goal. App. 5a.[1] When the voting trust was established, this faction controlled 49.66 percent of the outstanding shares of AMERCO. *Id.* None of the members of this group were members of the AMERCO board during the summer of 1988.

The conduct on which liability was based occurred during July 1988. App. 10a n.7. Over the weekend of July 22-24, 1988, respondents went to New York to meet with investment bankers and receive advice about selling the company. Joe Shoen learned of respondents' trip and called a special meeting of the board of directors for July 24. App. 6a. Prior to the meeting, Joe and his siblings Paul, James, Mark, and Sophia entered into a lawful voting trust agreement by which the shares of all five members would be voted as a block as directed by a majority of the five members, and would be voted against any corporate sale or merger not approved by all five members. James Shoen—not petitioner—was to act as the proxy to vote the shares if there were any disagreement as to the majority's wishes. App. 7a.

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[1] Mary Anna Shoen-Eaton was also part of this faction and she and her corporation, Maran, Inc., were plaintiffs below. They settled with petitioner as to punitive damages, however, and are not respondents here.

At the July 24, 1988 board of directors meeting and at a board meeting held the next day, the board voted unanimously to take a number of actions that would make it more difficult for the respondents to gain control of AMERCO and thereby sell the company. These actions were taken by the six-member board without any members dissenting, and were all taken on the advice of counsel. App. 41a-42a. Among the actions taken by the board was the issuance of certain previously-authorized AMERCO voting stock to key employees.[2] The employees gave the authority to vote these shares to the board, which in turn gave this authority to petitioner. *Id.*

Respondents (none of whom were board members) were not immediately informed of the board's actions. On July 27, 1988, respondents obtained the agreement of the trustee who voted the shares held in trust for minor Shoen siblings to vote with them. App. 44a. That action would have given the respondents control of more than 50 percent of the stock that was outstanding before the board of directors' actions on July 24 and 25, 1988. Upon delivering to AMERCO's secretary the signed shareholders' consents evidencing their voting trust on July 28, 1988, respondents were informed that they had failed to obtain control due to the additional shares that had been issued by the board on July 24, 1988. App. 7a.

Proceedings Below. Shortly thereafter, respondents sued petitioner and the other members of AMERCO's board of directors, alleging that the conduct by the board in July 1988 constituted a breach of fiduciary duty which prevented respondents from securing majority control of the company. Respondents sought a preliminary injunction

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[2] Issuance of these shares was a means of compensating and promoting the loyalty of valued employees. App. 46a. Joe Shoen loaned funds to these employees to enable them to place the down payment required to purchase the newly-issued AMERCO stock. App. 7a.

that would have canceled the July 1988 issuance of AMERCO voting stock to key employees. The trial court denied the request for a preliminary injunction, App. 25a, and the Arizona Court of Appeals affirmed, on the basis, *inter alia*, that respondents had failed to show a likelihood of success on the merits. App. 63a.

The case returned to the trial court for trial of respondents' claims for compensatory and punitive damages. Of the two claims that were tried to the jury, only one could possibly provide a basis for punitive damages—respondents' claim that the actions taken by the board of directors in July 1988 constituted a breach of the board's fiduciary duty by entrenching the power of incumbent management.[3] In the course of the seven-week jury trial, the trial court granted a motion for directed verdict on the issue of punitive damages in favor of all defendants except Joe Shoen. App. 67a. The trial court concluded that Joe Shoen could be liable for punitive damages individually, even though the only conduct challenged by the plaintiffs as violating the board's fiduciary duty was the collective action of the board taken pursuant to unanimous votes by all the directors. The court singled Joe Shoen out for the imposition of punitive damages—even though his conduct was indistinguishable from that of the directors granted immunity from punitive damages—because of Joe Shoen's alleged state of mind. In doing so, the court relied on evidence showing general animosity between Joe Shoen and his father and siblings—animosity unrelated to the vote on which liability for compensatory damages was based, or the circumstances surrounding that vote—including "a history of strong feelings, negative feelings * * * between [Joe Shoen and] his father, L.S. Shoen * * * and between [Joe Shoen and] Samuel Shoen." App. 72a.

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[3] Respondents also pursued a breach of contract claim that, under applicable state law, could not provide a basis for punitive damages. *See S.J. Amoroso Constr. Co.* v. *Lazovich & Lazovich*, 810 P.2d 775, 777 (Nev. 1991); *Sprouse* v. *Wentz*, 781 P.2d 1136, 1140 (Nev. 1989).

The jury returned a verdict of $1.47 billion in compensatory damages against all defendants, and $70 million in punitive damages against Joe Shoen. The trial court granted the defendants' motion for remittitur and reduced the award of compensatory damages to $461 million, to be paid to the plaintiffs in exchange for their AMERCO stock. The trial court further found the punitive damages award against Joe Shoen to be excessive and ordered that it be remitted to $7 million. App. 2a.

Joe Shoen filed a timely appeal to the Arizona Court of Appeals, limited to the issue of punitive damages.[4] Petitioner argued, among other things, that singling him out from the other members of the board of directors for an award of punitive damages violated the principle that punitive damages must be limited to instances of " 'punishing unlawful conduct and deterring its repetition.' " Appellant's Combined Answering Brief on Cross-Appeal and Reply Brief on Appeal at 23, *Shoen* v. *Shoen* (Ariz. Ct. App. No. 1 CA-CV 95-0199) (Feb. 12, 1997) (quoting *BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589, 1595 (1996)).

The Arizona Court of Appeals affirmed the judgment of punitive damages on the basis that the evidence supported the trial court's conclusion that "except for Joe, there was no evidence that the defendants acted with malice, while there *was* evidence to support a finding that Joe did." App. 11a (emphasis in original). The evidence relied on by the court of appeals to establish malice, like that relied on by the trial court, was not directly connected to the unlawful conduct on which the compensatory damages were based, or to the circumstances surrounding that conduct. Instead, the court of appeals justified the award of

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[4] Respondents cross-appealed the remittitur by the trial court of the award of punitive damages but did not challenge the remittitur of the compensatory damages award or the directed verdict on punitive damages entered on behalf of all the defendants except petitioner.

punitive damages based primarily on (1) a letter Joe Shoen wrote to his father *more than six years before* the July 1988 vote of the board expressing "resentment toward his father and siblings," (2) a "bitter" statement about an unrelated matter that Joe Shoen made to a third person almost a year *after* the conduct on which liability was based, and (3) a "history of strong feelings, negative feelings" the court concluded Joe had for his father and one of his brothers. App. 13a-15a. None of this conduct or alleged mental attitude was in any way unlawful but instead centered on the historically troubled relationship between Joe Shoen and two of the respondents—his father and one of his brothers.

Joe Shoen filed a timely petition for review with the Arizona Supreme Court arguing, *inter alia*, that the $7 million in punitive damages awarded against him violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Pet. for Rev. at 3, 12-13 (Aug. 25, 1997). The Arizona Supreme Court denied review on March 17, 1998. App. 24a. On June 3, 1998, Justice O'Connor entered an order extending the time within which to file this petition to and including July 15, 1998. App. 75a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN TENSION WITH THIS COURT'S PRECEDENTS, REFLECTS INSUFFICIENT AWARENESS OF THE CONSTITUTIONAL CONSTRAINTS ON PUNTIVE DAMAGES AWARDS, AND PROVIDES AN APPROPRIATE OPPORTUNITY TO FURTHER CLARIFY THE DUE PROCESS AND EQUAL PROTECTION LIMITATIONS ON SUCH AWARDS

"[T]ime and again, this Court and its Members have expressed concern about punitive damages awards run wild, inexplicable on any basis but caprice or passion." *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting) (internal quotations and citations omitted). This case presents the Court with the question whether the "acute danger of arbitrary deprivation of property" in violation of the Due Process Clause that can readily arise in connection with punitive damages is realized when a jury is invited to award such damages against a single member of a board of directors for a collective action by the entire board, based on nothing more than the defendant's "state of mind" without relation to any unlawful conduct. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). This case further presents the Court with the opportunity to examine the limits placed on punitive damages by the Equal Protection Clause in a particularly stark context: specifically, whether equal protection of the laws is denied when one member of a board of directors—whose conduct is sanctionable only because it is part of a collective action taken by all members of the board—is arbitrarily singled out for an award of punitive damages, even though his conduct is indistinguishable from that of every other member of the board.

In the absence of identical conduct by the other members of the board, the only *conduct* by Joe Shoen that could form the basis of an award of $7 million in punitive

damages—his single vote as one of six board members—violated no law and caused no harm. The conduct found unlawful here was a unanimous vote of AMERCO's board of directors, including Joe Shoen, in favor of proposals that the jury concluded violated the board's fiduciary duty to the plaintiffs.[5] Joe Shoen's vote was neither necessary nor sufficient for the board to take the actions that formed the basis of the plaintiffs' claim. Indeed, if Joe Shoen had voted against the rest of the members of the board of directors, the outcome to the plaintiffs would have been exactly the same. Nor was Joe Shoen found to be the driving force behind the board's vote, or to have exercised overbearing influence on the other members of the board.

Nonetheless, of all the directors, each of whom voted to take the same actions with regard to the corporation, the courts below concluded that Joe Shoen could be singled out because the evidence showed that only he could have acted "with the requisite state of mind." App. 11a. The evidence on which the courts relied to prove this state of mind, however, was wholly unrelated to the board vote on which liability for compensatory damages was based. Holding that Joe Shoen could be liable for punitive damages based solely on his state of mind thus provided the jury with discretion to award $7 million in punitive damages against him based only on its assessment of a discordant relationship between him and other members of the Shoen family. In addition, because Joe Shoen's conduct by itself could not form the basis for any award of compensatory damages, the $7 million in punitive damages is an infinite multiple of the amount of compensatory damages that could be assessed based on Joe Shoen's conduct standing alone. This case thus provides the Court with

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[5] For this breach of fiduciary duty, all members of the board of directors were found jointly and severally liable and were required, after remittitur, to pay over $461 million in exchange for plaintiffs' AMERCO stock. As noted, the award of compensatory damages was not appealed by defendants, nor was its remittitur appealed by the plaintiffs. App. 8a-9a.

the opportunity to address whether an award of punitive damages that is the product of such unfocused discretion violates the Due Process Clause, as well as whether such an arbitrary differentiation between Joe Shoen and the remaining directors—whose conduct was indistinguishable —violates the Equal Protection Clause.

A. The Award of Punitive Damages Is Inconsistent With This Court's Precedents Under the Due Process Clause

This Court's recent decisions concerning the limits placed on awards of punitive damages have primarily concerned whether the amount of a punitive damages award may be so excessive as to violate the Due Process Clause. *See BMW of North America* v. *Gore*, 116 S. Ct. 1589 (1996); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). These cases also have addressed, however, additional limits due process imposes on punitive damages. Thus, in *Pacific Mutual Life Insurance Co.* v. *Haslip*, this Court upheld a punitive damages award against a due process challenge only after assuring itself that the jury's "discretion [was] exercised within reasonable constraints." 499 U.S. at 20. Similarly, in *BMW of North America, Inc.* v. *Gore*, Justice Breyer noted that "[l]egal standards need not be precise in order to satisfy [due process]. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." 116 S. Ct. at 1605 (Breyer, J., concurring). In other words, the Due Process Clause requires that the discretion of the jury—and the court—be properly constrained and directed to avoid arbitrary awards of punitive damages. *See Haslip*, 499 U.S. at 18 (expressing concern about "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages").

This case provides the Court with the opportunity to determine whether such constitutionally required con-

straints are lacking when a court determines as a matter of law that only one of a group of defendants liable for a collective action may be singled out for jury consideration of punitive damages, based solely on evidence of that individual defendant's general "state of mind," totally disassociated from any unlawful conduct. By severing the connection between the conduct supporting compensatory damages and the award of punitive damages, the court below failed to limit adequately the jury's discretion. It in effect allowed the jury to punish one man for the actions of a group, actions the individual could not have taken alone. The court compounded its error by allowing the jury to base its punitive damages award on general "state of mind" evidence not connected in any meaningful way to the actions that formed the basis of liability, permitting the jury to pass judgment on subjective issues of familial relations through the award of punitive damages. By granting a directed verdict on the issue of punitive damages to all the director defendants except Joe Shoen, the court below gave "free reign to the biases and prejudices of individual jurors," allowing them "to target [an] unpopular defendant[] and punish [him] selectively" for a collective action of the board. *Haslip*, 499 U.S. at 63 (O'Connor, J., dissenting).

One of the ways in which juror discretion in the award of punitive damages has been cabined is by requiring a connection between compensatory and punitive damages. Indeed, punitive damages could not be awarded here in the absence of compensatory damages,[6] and this Court has insisted on review of punitive damages awards to ensure some proportional relationship between the two. *BMW*, 116 S. Ct. at 1601; *TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. Here the act that allowed the plaintiffs to

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[6] Under applicable Nevada law, punitive damages may not be awarded in the absence of compensatory damages. *See S.J. Amoroso Constr. Co.* v. *Lazovich & Lazovich*, 810 P.2d at 777; *City of Reno* v. *Silver State Flying Serv., Inc.*, 438 P.2d 257, 264 (Nev. 1968) (citing cases).

recover compensatory damages was the act of the *board*, but the state of mind that allowed them to recover punitive damages was that of an *individual*. This severing of the link between compensatory and punitive damages correspondingly expands the discretion of the jury, and nullifies one of the important constraints on that discretion. This case accordingly provides the Court with the opportunity to determine whether an award of punitive damages may stand where no compensatory damages could be imposed. *See generally Shippen* v. *Parrott*, 553 N.W.2d 503, 511 n.6 (S.D. 1996) ("punitive damages may not be imposed to 'punish' or to 'deter' non-actionable conduct") (citing *BMW*, 116 S. Ct. at 1598).

Three related aspects of the punitive damages award here evidence the lack of a connection between the award of punitive damages and that of compensatory damages, confirming that the punitive damages award against Joe Shoen lacked that essential constraint on the exercise of discretion by the jury. First, the lack of causation exhibits the lack of a connection—because the only conduct of Joe Shoen for which liability was imposed did not *by itself* cause any harm to respondents, the punitive damages award against him alone has no relationship to conduct that could, on its own terms, form the basis for compensatory damages. Second, the lack of proportionality exhibits the absence of a connection—because Joe Shoen's conduct by itself caused respondents no damages, the punitive damages award here is an infinite multiple of the amount of compensatory damages that could have been entered against Joe Shoen alone. Third, the disassociation between Joe Shoen's purported mental state and his sanctionable conduct exhibits the lack of a connection—because the evidence of his supposed mental state, reflecting an historically troubled family relationship, was not connected to his vote as one member of the board. Accordingly, the punitive damages award here violates the Due Process Clause because it is not adequately linked to the conduct that supported the award of compensatory damages, and

thus resulted from an exercise of discretion by the jury that had no meaningful constraints.

If the restraints placed by the Due Process Clause on the award of punitive damages are to have any meaning, they must at the least require that the conduct that forms the basis of liability for punitive damages be the legal cause of injury to the plaintiff. Here there is no such link because Joe Shoen's conduct—the casting of one among six votes of board members—did not by itself cause any damage to respondents.[7] The unlawful conduct supporting the compensatory award was a collective, unanimous action by the entire board of directors.

The court of appeals justified its punitive damages judgment against Joe Shoen on the basis that a majority of courts have held that joint tort-feasors may be held liable individually for punitive damages. App. 11a-12a. This rule applies where different defendants have taken different unlawful actions that result in a finding of liability. *See, e.g., Huckeby* v. *Spangler*, 563 S.W.2d 555, 560 (Tenn. 1978) (compensatory damages awarded against group of defendants for operating house of illegal gambling—punitive damages justified only against the defendant who fired a shot that injured the plaintiff). This rule, however, does not justify finding one director but not others liable for punitive damages based on identical

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[7] Allowing an award of punitive damages solely against Joe Shoen contradicts the well-established rule of corporate law that "where two or more directors participate in * * * wrongful acts" liability is joint and several. 3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1002 at 719 (1994 ed.) (footnote omitted); *see, e.g., Radol* v. *Thomas*, 772 F.2d 244, 259 (6th Cir. 1985) ("[t]he law is clear that directors and officers of a corporation are jointly and severally liable if they jointly participate in a breach of fiduciary duty"), *cert. denied*, 477 U.S. 903 (1986); *Smith* v. *Van Gorkom*, 488 A.2d 858, 889 (Del. 1985) ("since all of the defendant directors * * * take a unified position, we are required to treat all of the directors as one").

actions taken collectively by all that would violate no law if engaged in by a single director acting alone.

The award of punitive damages here further offends the Due Process Clause because of the lack of any relationship between Joe Shoen's purported "state of mind"—which provided the exclusive basis for awarding punitive damages—and the conduct that actually formed the basis for the award of compensatory damages. While a defendant's state of mind is undeniably relevant to determining whether punitive damages should be imposed, the conduct relied on by the courts below to evidence Joe Shoen's purported state of mind was remote in time, unrelated to, and of an entirely different character from the collective action on which liability was based--voting to entrench the existing board of directors. App. 10a & n.7.[8]

This evidence consisted of (1) a letter Joe Shoen wrote to his father more than *six years before* the vote of the board on which Joe's liability was based, expressing "resentment toward his father and siblings," (2) a "bitter" statement about an *unrelated* matter that Joe Shoen made to a third person *almost a year after* the conduct on which liability was based, and (3) a "history of strong feelings, negative feelings" the court concluded Joe had for his father and one of his brothers. App. 13a-15a. A review of this evidence, none of which manifests any unlawful conduct,[9] makes clear that the jury was allowed to enter

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[8] The jury was not required to determine precisely which action of the defendants formed the basis of the breach of fiduciary duty. On appeal, all parties and the Arizona Court of Appeals have acted on the basis that the events of June 23-24, 1988, which prevented respondents from securing a controlling majority of shares, constituted the breach on which compensatory damages were based. App. 10a n.7.

[9] While the trial court relied on only the three incidents discussed above to support the punitive damages award against Joe Shoen, the Arizona Court of Appeals discussed additional evidence in affirming the award of punitive damages. App. 15a-16a. Nearly all of this additional evidence, however, is also remote in time from

punitive damages against Joe Shoen based solely on its subjective assessment of Joe's feelings about his father and one of his brothers. To allow a $7 million punitive damages award on the basis of such perceived resentment towards one's family members, completely divorced from any unlawful conduct, is to invite the very sort of arbitrary decisionmaking that the Due Process Clause forbids. *See BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring) ("Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what *actions* may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.") (citations omitted) (emphasis added); *see also Morrissette* v. *United States*, 342 U.S. 246, 265 n.27 (1952) ("To hold that a mental element is necessary to a [finding of liability] is, of course, not to say that it is all that is necessary.").

The decision on punitive damages below is also contrary to *BMW of North America, Inc.* v. *Gore*, in which this Court noted that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's *conduct*." 116 S. Ct. at 1599 (footnote omitted) (emphasis added). This Court concluded that BMW's conduct was not "particularly reprehensible" in part because the harm inflicted by BMW was purely economic in nature, and because BMW had not engaged in the conduct found unlawful by the jury after being held liable for the same kind of conduct. *Id.* at 1599-600. Similarly here, the plaintiffs' damages were purely economic in nature, and Joe Shoen was not a recidivist wrongdoer. In *BMW*, this Court was reviewing a punitive damage award based on its size, but certainly an award of punitive damages of any size vio-

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the operative unlawful conduct. That which was contemporaneous with the unlawful vote—the failure of Joe Shoen to disclose to the other directors the existence of the voting trust—applied with equal force to the two other sibling defendants.

lates due process when it is based on a factor as arbitrary as whether one member of a board of directors has antagonistic feelings toward a shareholder affected by a vote of the board. *See TXO*, 509 U.S. at 467 (Kennedy, J., concurring) ("When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.").

In awarding punitive damages, it may be necessary to consider conduct outside of that on which compensatory damages are based in order to determine the amount that will properly punish the defendant and deter future unlawful conduct. *See TXO*, 509 U.S. at 462 ("scheme employed in this case was part of a larger pattern of fraud, trickery and deceit"); *BMW*, 116 S. Ct. at 1593 ("evidence that since 1983 BMW had sold 983 refinished cars as new * * * without disclosing that the cars had been repainted before sale"). This case, however, is unlike *TXO* and *BMW*, where punitive damages were based in part on evidence of additional wrongful or illegal conduct that was *virtually identical* to the conduct for which compensatory damages were imposed. In contrast, the evidence on which the jury was allowed to assess punitive damages here was not evidence of other votes of the board or other actions which had the effect of unlawfully freezing the plaintiffs out of control of the corporation, but instead, as previously discussed, remote incidents of discordant relations between Joe Shoen and several of his family members. Of course, to the extent that the board of directors had engaged in conduct similar to that which formed the basis for compensatory damages, that conduct would equally support punitive damages against all board members voting in the majority, not just Shoen.

In sum, this Court should grant the writ to determine whether the Due Process Clause prohibits an unlimited exercise of discretion that results in an award of punitive

damages against one member of a board of directors for a collective action taken unanimously by the board, where the award of punitive damages is based solely on purported familial ill will separate and apart from any unlawful conduct.

B. The Award of Punitive Damages Is Inconsistent With This Court's Precedents Under the Equal Protection Clause

The judgment below—which awards punitive damages against a single director for an action taken collectively by the entire board of directors—also violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause "keeps governmental decision-makers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) (citation omitted). A governmental differentiation between similarly situated persons violates the Equal Protection Clause under applicable rational-basis review "when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller* v. *Doe*, 509 U.S. 312, 324 (1993) (internal quotations and citations omitted).

The legitimate state interest behind punitive damages awards is "punishing unlawful *conduct* and deterring its repetition." *BMW*, 116 S. Ct. at 1595 (emphasis supplied). That Joe Shoen had negative feelings towards his family members unrelated to any unlawful conduct is irrelevant to the goal of punishing and deterring the conduct found unlawful here—a unanimous vote of the board to take actions that breached the board's fiduciary duty to the plaintiffs.[10] To attempt to deter the unlawful con-

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[10] That the differentiation between Joe Shoen and the other directors was drawn by the judge and the jury instead of the legislature does not insulate it from challenge under the Equal Protection Clause. *See Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624

duct of a collective board action by punishing a single director with $7 million in punitive damages, based on a jury's reaction to that director's troubled family relationship, draws a classification that "is not only 'imprecise,' but is wholly without any rational basis." *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 538 (1973).

The Arizona Court of Appeals justified the award of punitive damages on Joe Shoen alone on the theory that of all the members of the board, only he acted with the intent necessary to support an award of punitive damages. As we have already discussed, the flaw in that approach is that it ignores that the operative action for all defendants in this case was not only identical, but also that it was action that could only be found unlawful if engaged in collectively. In these circumstances, the relationship between deterring unlawful conduct and punishing Joe Shoen alone to the tune of $7 million for the collective action by the board is "so attenuated as to render the distinction arbitrary [and] irrational." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 446 (1985).

The guarantee of equal protection is a significant constraint on jury discretion in awarding punitive damages. A central concern reflected in this Court's cases is that punitive damages may be a product of jury passion and prejudice, inflicted to punish an unpopular defendant for reasons unrelated to the dispute at issue in the case. *Honda Motor Co.* v. *Oberg*, 512 U.S. at 429; *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring). Whether the concern manifests itself in excessive awards against out-of-state companies or against individuals who may not have endeared themselves to the jury, the Equal Protection Clause helps ensure that the unpopular defendant is not

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(1991) ("beyond all question [judge] is a state actor," and describing jury as "an entity that is a quintessential governmental body"); *BMW*, 116 S. Ct. at 1597 n.17.

punished solely for whatever extraneous reason makes him unpopular, by requiring the jury to treat the unpopular defendant no differently than similarly situated but less disadvantaged defendants. It is difficult to envision a clearer case for application of this principle: each of the defendants engaged in *identical* conduct, and the conduct was only effective as a collective act. Yet only one was singled out for punitive damages, in circumstances under which it was clear the jury was expressing its views on that defendant's familial relationships, *not* the conduct at issue in this case.

As this Court has recognized, "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 83 (1988). The Court should grant the writ of certiorari here and ultimately decide that where a defendant is arbitrarily singled out for punitive damages on a basis with no relationship to the underlying unlawful action, such an award violates the Equal Protection Clause.

II. THE QUESTION PRESENTED IS IMPORTANT IN DEVELOPING THE DUE PROCESS AND EQUAL PROTECTION LIMITS ON AWARDS OF PUNITIVE DAMAGES

Despite this Court's recent directives concerning the requirements placed by the Due Process Clause on punitive damages awards, the large variation in these awards suggests that additional guidance to the lower courts is necessary. *See* Cass R. Sunstein, Daniel Kahneman, and David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2092 (1998) ("After *BMW*, * * * the law governing constitutional constraints on punitive damage awards is in a state of considerable uncertainty and flux.") (footnote omitted); Theodore B. Olson, Theodore J. Boutrous, Jr.,

and Mark A. Perry, *Constitutional Challenges to Punitive Damages after* BMW *v.* Gore, Perspective on Legislation, Regulation, and Litigation, Vol. 2, No. 5 (May 1998) at 10 ("It has been a veritable punitive damages carnival in the twenty months since *BMW* was decided."). Granting the writ here would allow the Court to examine the constraints that due process places on punitive damages awards, based not primarily on the sheer size of the award, but instead on the essential limitation of jury discretion through the required connection between compensatory and punitive awards. In addition, commentators have noted that "[t]here appears to be a marked increase in the number and size of punitive damages awards in business cases." Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1415 (1993). Granting the writ to review the decision below would allow this Court to address a punitive damages award in the context of a business-related case where increasing numbers of these awards are being entered.

Moreover, this Court has not yet taken the opportunity to examine the issues raised by punitive damages under the Equal Protection Clause. Granting certiorari in this case would provide the Court with the opportunity to determine the limits placed on punitive damages by that Clause in the context where an individual has been arbitrarily singled out on a basis that has no relevance to punishing or deterring the relevant unlawful conduct. The equal protection issues are brought to the fore by the stark facts of this case and present the Court with an excellent vehicle by which to review the limits placed on punitive damages awards by the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jul. 24, 1997]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-CV 95-0199
Department A

SAMUEL W. SHOEN, M.D.; MARY ANNA SHOEN-EATON; CECILIA M. SHOEN-HANLON; KATRINA M. SHOEN-CARLSON; THERESA SHOEN-ROMERO; MICHAEL L. SHOEN; LEONARD S. SHOEN; and the following Arizona corporations: SAMWILL, INC.; CERMAR, INC.; KATTYDID, INC.; THERMAR, INC.; MICKL, INC.; MARIN, INC.; and L.S.S., INC.,

Plaintiffs-Appellees,
Cross Appellants,

v.

EDWARD J. SHOEN,
Defendant-Appellant,
Cross Appellee.

Appeal from the Superior Court of Maricopa County

Cause No. CV 88-20139

The Honorable Thomas C. Dunevant, III, Judge

MEMORANDUM DECISION
(Not for Publication—Rule 28, Arizona Rules of Civil Appellate Procedure)

WEISBERG, Judge

Plaintiffs were shareholders who sued Edward "Joe" Shoen ("Joe") and other members of AMERCO's board of directors (collectively, "defendants") regarding conduct in 1988 that deprived plaintiffs of majority ownership of AMERCO, the parent company of U-Haul. After a seven-month trial, a jury awarded plaintiffs $1.47 billion in compensatory damages against all defendants and $70 million in punitive damages against only Joe. The trial court, however, granted defendants' and Joe's motions for remittitur, reducing compensatory damages to $461 million, upon tender of plaintiffs' stock, and punitive damages to $7 million.

This appeal concerns only the award of punitive damages. Joe appeals the trial court's denial of his motion for judgment notwithstanding the verdict ("JNOV") or new trial, and plaintiffs cross-appeal the trial court's grant of remittitur. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Leonard Samuel ("L.S.") Shoen founded U-Hall in 1946. Two marriages produced six sons—Sam, Mike, Joe, Mark, Paul, and Jim—and five daughters—Mary Anna Sophia, Cecilia, Theresa, and Katrina.[1] Over the years, L.S. gave large amounts of his U-Haul/AMERCO stock to his children, eventually resulting in 97% of AMERCO's outstanding shares being held by the Shoen family, with employees owning the remainder.

By the mid-1970s, Sam, Mike, and Joe had taken active roles in managing the company, but a conflict had developed between Joe and other members of the Shoen family, particularly L.S., Sam, and Mike. In 1979, Joe left AMERCO because of the conflict and because he was

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[1] A third marriage produced another son, Scott, who was a minor at the time of the incidents at issue here.

upset that L.S. had chosen Sam and Mike rather than him as L.S.'s successors in the business.

In 1982, Joe wrote a letter to L.S. which, though stating his respect for his father, also expressed his bitterness as his position *vis-a-vis* his siblings:

> In response to your letter, I am out of U-Haul. If you want to goof off then please do as you want.
>
> You have my never ending respect as my father, as a great organizational talent. In my view you have chosen your subordinates, *and you have elected not to choose me.*
>
> I hope that you recognize that while as your child I owe my life to you many times over, that merely puts me on par with all your other children. Recall that when you have been ill, I have always recognized the debt I owe you, and acted in a manner reflecting that debt.
>
> *The children you have chosen as your subordinates and successors in U-Haul have never offered to carry their own weight let alone help carry part of your burden.*
>
> . . . . U-Haul is an organization to which I belong only as a shareholder. U-Haul has been playing with me.
>
> . . . .
>
> I will be a testament to what you have told me many times. "Shirt sleeves to shirt sleeves in 3 generations." I am tired of being called a failure. I have excelled at being your son. I work hard, I am honest. Tell that to your dope smoking children. [Emphasis original.]

This letter became known as the "heir-apparent letter."

Following his departure from the company, Joe retained 10% of AMERCO's shares and, along with Mark,

made continued attempts to oust L.S. and Sam from AMERCO's Board of Directors ("the Board"). In late 1986, in order to resolve their dispute, the family members entered a mediation process, which primarily involved Sam, Mike, Joe, and Mark. According to Sam, Joe was not participating in good faith and was very aggressive towards Sam and Mike. The professional mediator voluntarily resigned "because he was no longer objective about the behavior of Joe and Mark." The mediation resulted in an agreement that any family member could be on the Board unless any other family member had an objection, i.e., each person "could basically have veto power." Everyone who expressed the desire therefore became a director except Mike, who Joe vetoed "in an extremely abusive and hostile fashion just . . . short of violence." The mediation ultimately resulted in Joe becoming Chairman of the Board, Sam becoming President, and L.S. stepping down.

Sam eventually resigned as President. Exploring options for selling his AMERCO shares, Sam asked Joe if the company would be interested in buying them. "[I]n a very hostile and angry fashion," Joe offered to buy them at ten cents on the dollar, which Sam declined. Also, in early 1988, the company declared a dividend for all shareholders but withheld Sam's without reason, requiring him to sue the company to get it.

In mid-1987, many family shareholders expressed a desire to "achieve some liquidity" in their stock. By informal resolution, the Board agreed to investigate options and formed a committee to do so. The committee narrowed the options to a proposal by one investment banking firm, but Joe, who was a member of the committee, objected, resulting in no action being taken.

A shareholders' advisory meeting was held on July 16, 1988. During a break in the meeting, Sam discovered Joe reading through Sam's notes. When Sam told Joe he wanted his notes back, Joe refused to return them

and began yelling obscenities at Sam and screaming, "You want to sell the company." At that point, Joe charged Sam, grabbed one of his arms, and began swinging him. Their brother, Paul, then joined in the attack, grabbing Sam's other arm. Joe and Paul were on the verge of slamming Sam against the wall when Mike intervened and broke up the melee. The meeting then adjourned.

Several of the family members ("plaintiffs")[2] reassembled the next day to discuss shareholder liquidity options and the possibility of selling the company. Plaintiffs reached an agreement to attempt to maximize the liquidity and value of their stock. They then made plans to meet with Bear Stearns, an investment banking firm in New York, to discuss their options. They also filed documents with the Securities and Exchange Commission indicating that they had joined together for this purpose.

The effect of the plaintiffs' agreement was to form a controlling plurality of ownership through a voting trust. It resulted in plaintiffs controlling 49.66% of the company, versus Joe's control of slightly less than 46%. L.S. then traveled to Portland, Oregon to convince the trustee for the shares held in trust for Scott to join their alliance. Scott's shares represented 2.54% of the company and would have given plaintiffs an absolute majority, thus permitting all the Shoens to sit on the Board and fully explore all available liquidity options. The trustee eventually did consent to joining the alliance, but only after the events of July 22-24, 1988.

On July 22, 1988, Joe came into possession of a recorded conversation between Sam and his attorney, which alerted him to the plaintiffs' planned meeting in New York that weekend and their desires with respect to their shares.

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[2] The plaintiffs are L.S., Sam, Mary Anna, Cecilia, Theresa, Katrina, Mike, and their respective corporations, each of which held AMERCO stock on behalf of its principal.

That evening, he played the tape for his brother Mark (who was not a director) and then destroyed it.[3]

Joe then called a special meeting of the Board for Sunday, July 24, 1988. At the meeting, he informed the rest of the Board about plaintiffs' attempt to gain a majority. He also told the Board

> [t]hat a corporate raider was going to take over [the company], named Paul Bilzarian, that an investment banking firm who [he] believed to be at that time Drexel Burnham was arranging the financing. [Plaintiffs'] intent was to sell the company in pieces and basically destroy the organization.

In fact, there is no evidence to indicate that Bilzarian, an attorney known in the 1980s for advising on corporate takeovers, was ever involved, and the only basis for Joe's misinformation was his knowledge that Sam had attended business school with Bilzarian, had lunch with him "somewhere in the recent past," and was visiting New York, where Bilzerian apparently worked. Joe failed to inform either the Board or the attorney (Jock Patton) advising the Board at the meeting of the basis for his knowledge regarding plaintiffs' actions.

At approximately midnight on Sunday, July 24, 1988, in response to the perceived threat posed by plaintiffs, the Board voted to adopt the following plan. In order to divest plaintiffs of a controlling majority, the Board issued

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[3] Joe testified to some rather mysterious circumstances surrounding his acquisition of the tape. He testified that an unknown woman phoned him after business hours at the U-Haul headquarters, saying that she had something he needed to hear. She then came to his office, gave him the tape, refused to identify herself, and left. Joe had never seen her before and has not seen her since. No one, other than Mark, who provided no testimony on this, had ever heard of the tape until Joe testified at trial. Therefore, the only evidence to support even the existence of the tape was Joe's uncorroborated testimony.

the remaining authorized and unissued 8,099 AMERCO shares to five inside employees. Each share was valued at $2,715.00, totalling almost $22 million. Each of the five employees made a down-payment of approximately $162,000.00 and then paid the balance by virtue of a 5-year, non-recourse promissory note secured by the newly-issued shares. To finance the down payments, Joe gave each employee a loan from his children's conservatorship accounts. The employees then gave the authority to vote their shares to the Board, which in turn gave this authority to Joe.

Before the Board meeting, Joe met with four of his siblings—Paul and James, who were directors, and Mark and Sophia, who were not—and the five formed a voting trust, which was not disclosed to either Patton or the other directors. The agreement provided that: 1) the shares of the five members must be voted as a block (determined by a majority of the members); 2) the shares would be voted against any corporate sale or merger that was not unanimously approved (i.e., any member could veto such a transaction); and 3) the proxies for the shares would be given to James if a majority vote could not be ascertained. The result of the subsequent Board's action, therefore, was to give Joe and his voting trust over 50% of the AMERCO shares, thereby divesting plaintiffs of their controlling majority.

Plaintiffs knew nothing of the Board's action and, on July 28, 1988, filed with AMERCO's general counsel a signed consent of what they believed to be a true majority of shareholders. The consent did not remove any of the existing directors but added all existing family shareholders to the Board. Plaintiffs learned of the Board's action only when their consent was rejected as not representing a majority of shareholders. Plaintiffs then commenced this litigation.

In addition to the above facts, plaintiffs produced evidence of various other acts by the Board that occurred

after July 1988, which included the following, by way of example: days after filing the consent, the Board canceled plaintiffs' health insurance, which had been provided by the company; shareholder meetings were held in the middle of the desert and voting made difficult; and a "poison pill" provision was inserted into the preferred shares in order to discourage a takeover of the company. Plaintiffs in general presented evidence of many acts taken by the Board that had the effect of limiting or eliminating plaintiffs' ability to exercise any control over the company, or obtaining liquidity for their stock.[4]

Prior to submitting the case to the jury, defendants filed a motion for directed verdict on the issue of punitive damages, arguing that plaintiffs had failed to present sufficient evidence to warrant punitive damages. The trial court granted the motion with respect to all defendants except Joe. The jury then returned a verdict finding that defendants had breached their fiduciary duty to plaintiffs. The jury awarded damages based upon what it determined to be the difference between the value of the plaintiffs' stock in 1988 and the date of verdict: $1.47 billion. The jury also awarded punitive damages against Joe in the amount of $70 million.

Defendants then filed motions for remittitur, which the trial court granted. It reduced the compensatory damage award to $461 million, upon tender of plaintiffs' stock, and the punitive damage award to $7 million. Plaintiffs accepted the remittitur rather than electing a new trial. The trial court then entered judgment for these amounts, ordering that, upon payment of the compensatory damages, plaintiffs must transfer their stock to defendants.

Joe has appealed the trial court's denial of his motion for JNOV or new trial. Plaintiffs have cross-appealed the trial court's grant of remittitur. Neither the compensatory

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[4] Additional relevant facts will be discussed in our analysis of the issues.

damage award nor the trial court's remittitur of it is at issue here.

DISCUSSION

I. JOE'S APPEAL [5]

A. *STANDARD FOR PUNITIVE DAMAGES*

The parties agree that, because AMERCO is a Nevada corporation, Nevada law controls the substantive issues of this litigation, and the trial court therefore used the Nevada standard for awarding punitive damages. In Nevada, the prerequisites for an award of punitive damages are established by statute. Nev. Rev. Stat. Ann. ("N.R.S.") section 42.005(1) provides, in part:

> [I]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant.

Thus, a plaintiff must prove "oppression, fraud or malice" on the part of the defendant. Nevada courts have interpreted these terms to require proof that the defendant had "a deliberate intention to injure, vex, annoy or harass." *Craigo v. Circus-Circus Enters.*, 786 P.2d 22, 27 (Nev. 1990). The Nevada Supreme Court also stated in *Craigo* that punitive damage awards based on malice should be restricted "to those extreme cases that convincingly demonstrate conduct motivated by hatred and ill-will and the deliberate intent to injure. . . . It is the evil motive to injure that must be shown directly or by inference as a

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[5] In an opinion filed concurrently with this memorandum decision, we concluded that the standard for reviewing the trial court's denial of Joe's motion for JNOV is *de novo*. *See Shoen v. Shoen*, 1 CA-CV 95-0199.

predicate for a punitive award based upon malice." *Id.* at 26-27.[6]

In addition, evidence to support punitive damages must be clear and convincing. N.R.S. § 42.005(1). However, the distinction between clear and convincing evidence and evidence that merely constitutes a preponderance is solely a question of the weight of the evidence, and therefore is a matter for the trier of fact, not this court. *Gilbert v. Board of Med. Examiners*, 155 Ariz. 169, 181, 745 P.2d 617, 629 (App. 1987). Accordingly, we review only for whether evidence exists to support the award of punitive damages, not whether such evidence is clear and convincing. *Id.*

B. *THE EVIDENCE SUPPORTS THE PUNITIVE DAMAGE AWARD*

We begin by noting that we are concerned only with the award of punitive damages. Because Joe has not appealed the jury's verdict that he and the other defendants breached their fiduciary duty to plaintiffs, we accept that such a breach occurred. We further note that the jury was not given the opportunity to specify precisely which of defendants' acts constituted the breach. We therefore need not determine which of the numerous acts alleged to be breaches by plaintiffs were actually breaches, whether independently or collectively.[7]

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[6] The instructions given to the jury in the instant case provided: "In order to prove oppression, fraud, or malice, express or implied, Plaintiffs must prove conduct . . . motivated by hatred and ill-will and the deliberate and evil intent to injure Plaintiffs." The jury's special verdict form contained similar language. The parties did not object to this instruction.

[7] Both parties focus their discussion primarily on the events of the weekend of July 23-24, 1988, which deprived plaintiffs of a controlling majority, and the parties' computation of damages also focused on this as the significant breach.

1. *Joe's Failure to Take Action Apart from the Board*

Joe first argues that puntive damages should not have been awarded against him because the actions forming the nucleus of the breach of fiduciary duty were taken by the Board as a whole. Because all other defendants were granted a directed verdict on punitive damages, Joe claims that "it would be wholly illogical to conclude that [he] was somehow acting with an 'evil motive to injure' when he took the *identical* actions that the other [defendants] took—actions that, as a matter of law, did not allow the other [defendants] to be subjected to punitive damages." [8] We disagree.

The basis for the trial court's rulings on defendants' motion for directed verdict on punitive damages was that, except for Joe, there was no evidence that the defendants acted with malice, while there *was* evidence to support a finding that Joe did. It is immaterial whether Joe took the same actions as the other defendants because the issue is whether those actions were taken with the requisite state of mind.

For example, it is possible for two defendants to take the same action, even acting in concert, that results in a breach of fiduciary duty, with only one of them acting with malice. It is also possible that both acted with malice but that there was sufficient evidence to support such a finding against only one. In either instance, punitive damages would be assessed properly against only one of the defendants, even though both participated equally in the breach.

> [T]he majority of courts allow the jury to make different punitive awards against joint tortfeasors, even when the defendants are liable jointly and severally

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[8] Joe concedes that an award of punitive damages against only one director would be permissible in a case when that director dominated or deceived the other directors.

> for compensatory awards. The evidence must show the different degrees of culpability among the tortfeasors. Punitive damages may be awarded against one or more defendants and not against others depending on their culpability.

1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 4.4(B)(2)(b)(3), at 186 (3d ed. 1995) (footnotes and citations omitted); *see also* 5 Marilyn Minzer, *et al.*, *Damages in Tort Actions* § 40.06[4], at 40-243 to 40-244 (1996). Accordingly, we reject Joe's argument that punitive damages against him were improper simply because the other defendants obtained a directed verdict.[9]

2. *Advice of Counsel*

Joe also argues that punitive damages were improper because he, like the rest of the Board, acted on the advice of counsel in taking the actions that formed the foundation of the breach. A defendant's good faith reliance on the advice of counsel may preclude an award of punitive damages. *See Angell v. Leslie*, 832 F.2d 817, 821-22 (4th Cir. 1987); *Huggins v. Deinhard*, 127 Ariz. 358, 360, 621 P.2d 45, 47 (App. 1980); *Pre-Fit Door, Inc. v. Dor-Ways, Inc.*, 13 Ariz. App. 438, 441, 477 P.2d 557, 568 (1970); *Fox v. Aced*, 317 P.2d 608, 610 (Cal. 1957).[10]

We conclude, however, that this advice of counsel "defense" does not preclude punitive damages here because

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[9] We also note the possibility that the trial court erred in directing a verdict on punitive damages in favor of the other directors, which plaintiffs have not appealed.

[10] Regarding advice of counsel, the jury was instructed, without objection, as follows:

> In determining whether damages are appropriate, you may consider [Joe's] reliance upon the advice of counsel in taking the actions challenged by Plaintiffs. Such reliance upon the advice of counsel may negate the existence of oppression, fraud, or malice, express or implied, upon which a damage award must be based.

there is evidence that Joe's reliance, if any, was not in good faith. Patton gave his advice with the objective of "forc[ing] a negotiation on a level playing field between the board on the one hand who has a duty to all stockholders . . . and the insurgents who are acting out of self-interest." The goal, according to Patton, was to issue shares to a "neutral third party" in order to prevent shifts in the two Shoen factions, which were fairly balanced, from damaging the company.

Patton's advice to the Board, however, was based upon what Joe knew to be incomplete information. First, Joe did not inform Patton of the voting trust he had formed with some of his siblings that controlled 45.8% of AMERCO's shares. Second, Patton was unaware of the plan to have the new employee shareholders give proxies for their shares to Joe. Not knowing these facts, Patton was unaware of the effective result of his advice: to place complete control over a majority of the shares in the hands of Joe and the members of the voting trust. From this evidence, the jury could reasonably conclude that, to the extent Joe relied on the advice of counsel, it was not in good faith.

3. *Evidence of Malice*

In denying defendants' motion for directed verdict with respect to Joe, the trial court highlighted three pieces of evidence that could support a finding of malice on Joe's part. The court made it clear that it considered these only to be examples and not exhaustive. At any rate, we agree with the trial court that these examples are sufficient to support the punitive damages award.

The trial court first relied upon the "heir-apparent" letter. This letter reflected that Joe was bitter about L.S.'s choice of Sam and Mike as his "successors." He referred to his siblings as "your dope smoking children," and accused them of not "carry[ing] their own weight" or helping L.S. with his burden. He further accused U-Haul of "play-

ing with" him and angrily renounced any interest in U-Haul other than as a shareholder.

Joe argues that the letter does not indicate any ill-will because, in it, he told L.S. that he respected him as his father and "a great organizational talent." However, in writing the letter, Joe underlined certain parts, and thereby emphasized his resentment towards his father and siblings, rather than his respect for L.S. In any event, the letter contained statements that support an inference of ill-will to which the jury was free to attach more weight.

The trial court also relied upon what it referred to as another letter written by Joe. Joe correctly points out that the letter referred to was not written by Joe, but by an attorney, Steve Case, and that the trial court had sustained a hearsay objection to its introduction into evidence. Notwithstanding, Case's testimony regarding his conversation with Joe, which was the subject of the letter, is in the record without objection, and it supports an inference of malice.

Case testified that he had a conversation with Joe in May 1989, in which Joe told him that he "was bitter about attacks upon his family, and about process servers waiting and serving his children." Case also relayed to plaintiffs that Joe threatened to make "life as difficult as possible under any pretext" for them. He also testified that Joe had specifically hired someone to accomplish this task.

Joe argues that this evidence is not probative of malice because Case further testified that, when he originally used the term "life," he had exaggerated. Case testified that he had used the term "[p]erhaps loosely," and really meant only certain transactions that were the subject of his conversation with Joe, which apparently dealt with plaintiffs seeking to transfer their personal corporations to Nevada and having AMERCO therefore issue new stock certificates to them. Nevertheless, regardless of the precise context of Joe's comment, the jury could reasonably infer from

it a general ill-will toward plaintiffs and a desire to thwart their efforts at exercising their rights as shareholders.

The trial court finally relied upon Joe's "history of strong feelings, negative feelings" for L.S. and Sam. The trial court did not mention specific instances, stating only that:

> there is [Joe's] conduct, both his conduct in speech and his conduct with respect to [Sam], and also his conduct in speech with respect to [L.S.], that would suggest that there is enough for a jury to decide whether or not he is motivated by spite and ill will.

Conduct and speech by Joe toward L.S. and Sam that would support a finding of malice include the following. In February 1989, Joe terminated L.S.'s lifetime employment agreement for the ostensible reason that "L.S. ha[d] repeatedly failed to act in the best interests of AMERCO." In addition, Joe behaved in a "very aggressive" manner toward Sam at the mediation process in late 1986, and, when Sam asked about selling his AMERCO shares, Joe became "extremely abusive and hostile," offering only ten cents on the dollar. Furthermore, Joe physically assaulted Sam at the July 1988 shareholders meeting and nearly "slammed [him] against the wall." This evidence, which is not exhaustive, clearly supports an inference that Joe acted with malice when breaching his fiduciary duty to plaintiffs.

In addition to the examples given by the trial court, the record also includes other evidence to support a finding of malice on Joe's part. For instance, the record contains evidence that Joe failed to fully disclose to the non-Shoen directors and Patton facts that could have been material to their actions at the July 24 Board meeting. He did not disclose the voting trust that controlled 45.8% of the then-outstanding shares, nor that he had gained much

of his information from confidential communications between Sam and his attorney.[11]

Joe's ill-will and intent to injure plaintiffs is further illustrated by a second physical assault, seemingly even more violent than that against Sam. At a shareholders' meeting in March 1989, Mike was assaulted by Joe and Mark (who is not a defendant). Joe held Mike's arms while Mark "pound[ed Mike] with his fists." This episode shows an intent on the part of Joe to injure Mike, one of the plaintiffs here.

Joe's primary argument against all this evidence is that it is too remote in time from and unconnected to the actions that constituted the breach. This characterization, however, is inaccurate. For example, Joe's failure to fully disclose material facts to the Board was, if not a component of the breach itself, directly connected to it. Also, Joe's assault on Sam occurred only a week before the critical weekend of July 23-24, 1988, and was precipitated, at least in part, by Joe's anger over Sam's perceived desire to sell the company, a contributing factor behind Joe's breach. In addition, although the "heir-apparent" letter was written approximately six years prior to the breach, it too was arguably connected to the breach because it was precipitated by resentment over L.S. and Joe's siblings' control of the company.

Although Joe correctly argues that, to support punitive damages, plaintiffs must prove that Joe "was motivated by an evil intent to injure *in taking the actions that constitute the alleged breaches of fiduciary duty*," (emphasis deleted (he incorrectly contends that the evidence used to establish such an intent must be limited to actions

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[11] Regarding this latter point, the pure implausibility of Joe's story could have enabled the jury to conclude that Joe had either fabricated the entire event or had, in fact, ordered the surreptitious taping himself.

that constitute the breach. N.R.S. section 42.005(1) explicitly states that punitive damages are appropriate "where it is proven . . . that the defendant has been guilty of . . . malice, *express or implied.*" (Emphasis added.) Nevada courts have consistently held that the term "express or implied" refers to "the evidence by which malice is established," *Nevada Credit Rating Bureau, Inc. v. Williams,* 503 P.2d 9, 14 (Nev. 1972); *Craigo,* 786 P.2d at 23, and that malice may be proven by inference. *See First Interstate Bank v. Jafbros Auto Body, Inc.,* 787 P.2d 765, 767 (Nev. 1990); *Craigo,* 786 P.2d at 26-27.

Thus, any evidence that implies that a defendant acted with an intent to injure when committing the breach will support punitive damages, regardless whether such evidence is otherwise connected to the breach. All the evidence discussed above supports an inference that Joe had ill-will toward plaintiffs and therefore acted with malice in breaching his fiduciary duty to them.

For similar reasons, we reject Joe's argument that the above evidence is too remote in time. First, as noted above, some of the conduct occurred during or very close in time to the breach. Second, remoteness in time goes to the weight of evidence, not its relevance. *Hawkins v. Allstate Ins. Co.,* 152 Ariz. 490, 499, 733 P.2d 1073, 1082 (1987); *State v. Paxton,* 186 Ariz. 580, 587, 925 P.2d 721, 728 (App. 1996). "While a significant time span may reduce the probative force of evidence, it does not eliminate it." *Hawkins,* 152 Ariz. at 499, 733 P.2d at 1082. In *Hawkins,* the supreme court held that evidence of wrongful procedures 15 years earlier was not too remote to support an insurer's wrongful state of mind for the purpose of imposing punitive damages. Similarly, the evidence of Joe's ill-will toward plaintiffs, none of which occurred more than six years from the breach, was not too remote to support punitive damages here.

We therefore conclude that the record contains substantial evidence that Joe acted with malice when breaching his fiduciary duty to plaintiffs, and that the trial court therefore did not err in denying Joe's motion for JNOV.[12]

4. *Grant of Remittitur*

Joe lastly argues that the trial court's grant of remittitur demonstrated its recognition that the verdict was defective. This argument is meritless. The trial court's grant of remittitur demonstrates only the trial court's conclusion that the amount of punitive damages was "clearly excessive." It has no bearing upon the issue whether substantial evidence supports an award of punitive damages, in general.

II. PLAINTIFFS' CROSS-APPEAL

Plaintiffs cross-appeal the trial court's grant of remittitur, which reduced the jury's punitive damage award from $70 million to $7 million. The trial court concluded that the award was excessive pursuant to the standard established by the Nevada Supreme Court in *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 746 P.2d 132, 136-37 (Nev. 1987), which all parties concede is controlling. The court in *Ace Truck* set forth the standard for reducing a jury award of punitive damages, and the factors that the trial court may consider:

> Punitive damages are legally excessive when the amount of damages awarded is *clearly* disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case.
>
> . . . .

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12 Although we have noted that on review we need not determine whether the evidence was clear and convincing, *see Gilbert*, 155 Ariz. at 181, 745 P.2d at 629, we nevertheless conclude that the evidence presented was strong enough for the jury to so find.

> In arriving at the ultimate judgment of where excessiveness begins, courts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can be properly imposed in a given case. Relevant circumstances include such matters as the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind.
>
> As can be readily understood, these factors are largely common sense considerations which relate in everyday terms to the judgment of what goes beyond fair and proportionate punishment and reasonable deterrence under the circumstances. The ultimate question remains the same: Whether the fact finder has clearly exceeded the reasonable bounds of punishment due and justifiable deterrence as related to the acts complained of.

Id (footnotes omitted).

We review the trial court's grant of remittitur for abuse of discretion. *Mammo v. State*, 138 Ariz. 528, 133, 675 P.2d 1347, 1352 (App. 1983); *Torres v. North Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982). Thus, we must determine whether the trial court abused its discretion in finding that the jury's punitive damage award was "clearly excessive" under the guidelines of *Ace Truck*.

Joe contends that we must affirm the trial court's ruling for three reasons: 1) the trial court did not abuse its discretion under *Ace Truck*; 2) plaintiffs are estopped from contesting the remittitur because they filed a claim for the reduced amount in defendants' bankruptcy pro-

ceeding;[13] and 3) the trial court was constitutionally required to reduce the amount to comport with due process. Because we conclude that, pursuant to the factors set forth in *Ace Truck*, the trial court did not abuse its discretion in finding the $70 million punitive award clearly excessive, we need not consider Joe's other two arguments.

Plaintiffs argue that the trial court's primary reason for finding the verdict excessive was that it was so much larger than any other punitive damage award in a reported Nevada case,[14] which is an insufficient basis for remittitur. We agree that that reason would be insufficient, but disagree that it was the basis for the trial court's conclusion. Rather, the trial court focused mainly upon a comparison of the amount of the award and Joe's net worth.

Nevada courts have consistently held that the defendant's financial situation, and the punitive damage award's effect on his net worth, is a valid and important consideration in determining whether the award is excessive. *See, e.g., Republic Ins. Co. v. Hires*, 810 P.2d 790, 793 (Nev. 1991); *S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 810 P.2d 775, 778 (Nev. 1991); *Ainsworth*, 763 P.2d at 677; *Ace Truck*, 746 P.2d at 135, 137. "[T]he amount of punitive damages assessed should be sufficient

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[13] Following the jury verdicts in this case, Joe filed for Chapter 11 bankruptcy. In the bankruptcy proceedings, plaintiffs filed claims for their punitive damage award in the amount of $7 million. This amount was subsequently reduced to $6 million when plaintiff Mary Anna settled her punitive damage claim for $1 million. Joe's confirmed Plan of Reorganization provided for payment of plaintiffs' $6 million claim. The claim, however, remained disputed, with plaintiffs contending it was nondischargeable in bankruptcy, and, based upon the record before us, there has been no ruling on this issue by the bankruptcy court.

[14] The trial court found, and the parties agree, that the largest reported punitive damage award in Nevada is $6 million. *See Ainsworth v. Combined Ins. Co.*, 763 P.2d 673 (Nev. 1988).

to punish a wrongdoer and deter others from acting in a similar manner *without financially annihilating the defendant.*" *Ace Truck*, 746 P.2d at 135 (emphasis added).[15]

In fact, the court's reduction of the punitive damage award in *Ace Truck* was based primarily upon this factor. The two defendants in that case had net assets worth $1,626,000.00 and $705,700.00, before deducting the compensatory damages of $391,049.00 The jury awarded punitive damages of $500,000.00 and $300,000.00 against them, respectively. The court held:

> The compensatory award, quite large under the circumstances, reduces the estate of each defendant substantially. If [each defendant] had to pay half of the $391,049.00 compensatory award, then the punitive award against [one defendant] would be calculated at forty-three percent of his assets, and the punitive award against [the other] would be calculated at seventy percent of his assets. These are indeed excessively and disproportionately punitive under the circumstances. We hold the awards to be clearly excessive and disproportionate as a matter of law.

Ace Truck, 746 P.2d at 138.

In the instant case, plaintiffs concede that the only evidence of Joe's assets was his AMERCO stock, which was worth approximately $70 million (which is presumably how the jury determined the amount of its verdict),

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[15] The court in *Ace Truck* held that this "financial annihilation rule" is insufficient as a general rule because many punitive damage awards can be excessive without rising to the annihilation level. The court, however, stated that the rule still applies "in clear cases where the defendant is being wiped out," as in *Miller v. Schnitzer*, 371 P.2d 824 (Nev. 1962), where the defendant with assets of $51,000.00 was initially assessed $45,000.00 in compensatory damage and $50,000.00 in punitive damages. *Ace Truck*, 746 P.2d at 135.

a recent $2 million bonus from AMERCO, and an annual salary of $200,000.00, which covered his living expenses.[16] Based on this evidence, the $70 million punitive damage award was nearly 100% of Joe's current assets, even without taking into account Joe's joint and several liability for the $461 million of compensatory damages. Under these circumstances, we cannot conclude that the trial court abused its discretion in finding that the "jury's award is far more 'than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct,' " quoting *Ace Truck*, 746 P.2d at 137.

This is particularly true when one considers the nature of the conduct[17] and injury at issue here. *See Ace Truck*, 746 P.2d at 137. While we cannot be certain of the precise conduct that the jury found to constitute the breach, the crux of plaintiffs' complaint was that defendants had destroyed the value of their stock, wrongfully deprived them of majority control of the company, and restricted their ability to liquidate their shares and exercise their rights as shareholders. Thus, the resulting injuries were primarily financial.

We also note that plaintiffs were not particularly vulnerable victims. All are college graduates, many with advanced professional degrees, and appear to have been fairly sophisticated with respect to financial and corporate matters. *See id.; cf. Ainsworth*, 763 P.2d at 677 (plaintiff "highly vulnerable" due to devastating stroke that rendered him unable to communicate effectively, requiring

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[16] In post-verdict motions, Joe attempted to introduce additional facts regarding his financial situation, but the trial court refused to consider them. This ruling has not been challenged on appeal.

[17] We note that the conduct relevant to the determination whether the punitive award was clearly excessive is only that conduct constituting the breach, not the extrinsic evidence used to show Joe's malice.

him to deal with defendant insurer through his wife, who was "inexperienced in handling business matters"). Under these circumstances, the trial court was within its discretion to conclude that Joe's conduct and plaintiffs' injury did not warrant a punitive award of $70 million which, according to the available evidence, would wreak financial annihilation.

For these same reasons, we conclude that the trial court did not abuse its discretion in fixing the amount of punitive damages at $7 million, or approximately 10% of Joe's then-current assets, even without consideration of his responsibility for the enormous compensatory damages awarded. Based on the nature of Joe's conduct and the injury to plaintiffs, the trial court did not abuse its discretion in concluding that this amount was sufficiently "necessary and fairly deserved in order to punish [Joe] and deter others from similar conduct." *See Hires*, 810 P.2d at 793 (reducing jury's punitive damage award from 13% of the defendant insurance company's net worth to less than 3%). Accordingly, we affirm the trial court's grant of remittitur.

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Joe's motion for JNOV and grant of Joe's motion for remittitur.

/s/ Sheldon H. Weisberg
SHELDON H. WEISBERG
Judge

CONCURRING:

/s/ Susan A. Ehrlich
SUSAN A. EHRLICH
Presiding Judge

/s/ Sarah D. Grant
SARAH D. GRANT
Judge

APPENDIX B

SUPREME COURT
STATE OF ARIZONA

March 19, 1998

RE: SAMUEL W. SHOEN, M.D./MARY ANNA SHOEN-EATON *et al* vs. EDWARD J. SHOEN
Supreme Court No. CV-97-0394-PR
Court of Appeals No. 1 CA-CV 95-0199
Maricopa County No. CV 88-20139

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 17, 1998, in regard to the above-referenced cause:

ORDERED: Petition for Review [Appellant Edward Shoen]—DENIED.

FURTHER ORDERED: Cross-Petition for Review [Appellees Samuel Shoen et al]—DENIED.

Chief Justice Zlaket and Justice Martone recused themselves and did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 19th day of March, 1998.

NOEL K. DESSAINT, Clerk

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
FOR THE COUNTY OF MARICOPA

No. CV 88-20139

SAMUEL W. SHOEN, M.D., *et al.*,
Plaintiffs,

vs.

EDWARD J. SHOEN, *et al.*,
Defendants.

ORDER DENYING APPLICATION FOR PRELIMINARY INJUNCTION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT THEREOF

At the conclusion of testimony and the presentation of evidence on the hearing for Preliminary Injunction, the Court considered memoranda submitted by the parties, various testimonial affidavits and designations of deposition testimony along with the proposed Findings of Fact and Conclusions of Law and objections thereto filed by the parties.

Having done so, IT IS HEREBY ORDERED denying Plaintiffs' Application for a Preliminary Injunction, the Court FINDING that no irreparable injury will result to the Plaintiffs by failing to grant same and for the additional reasons set forth in those Findings of Fact and Conclusions of Law adopted by the Court as follows:

The Court adopts those proposed Findings of Fact and Conclusions of Law submitted by the Defendants as they are modified in this Order and denies the Findings of Fact and Conclusions of Law proposed by the Plaintiffs except insofar as the same are not inconsistent with the Findings and Conclusions adopted by the Court.

FINDINGS OF FACT

I.

THE PARTIES

Plaintiffs.

1. Katrina M. Shoen, SAMWILL, Inc., MICKL, Inc., MARAN, Inc., CEMAR, Inc., KATTYDID, Inc., THERMAR, Inc., and L.S.S., Inc. (collectively the "Plaintiffs") are each alleged to be beneficial owners of stock in Amerco. Although there is some confusion at present over actual title to the stock because of the lapse of the corporate charters of all of the personal holding companies of the Shoen family members, title to the stock must rest either in the corporate plaintiffs or the individuals who owned the stock of the lapsed corporation. For purposes of the present proceedings, it matters only that there are some plaintiffs who own stock and have standing to pursue this action and the Court finds that such plaintiffs do exist.

2. Samuel W. Shoen, M.D., at all material times, was the beneficial owner of 10,104.81 shares of Amerco stock held of record by SAMWILL, Inc., an Arizona corporation he controls. Samuel W. Shoen was the President of U-Haul International or Amerco between 1979 and February 6, 1987.

3. Michael L. Shoen, at all material times, was the beneficial owner of 10,089.81 shares of Amerco stock held of record by MICKL, Inc., an Arizona corporation he controls.

4. Mary Anna Shoen-Eaton, at all material times, was the beneficial owner of 8,357.69 shares of Amerco stock held of record by MARAN, Inc., an Arizona corporation she controls.

5. Cecelia M. Shoen Hanlon, at all material times, was the beneficial owner of 5,829.96 shares of Amerco stock held of record by CEMAR, Inc., an Arizona corporation she controls.

6. Katrina M. Shoen, at all material times, was the beneficial owner of 5,041.55 shares of Amerco stock held directly by her or by KATTYDID, Inc., an Arizona corporation she controls.

7. Theresa M. Shoen, at all material times, was the beneficial owner of 4,129.11 shares of Amerco stock held of record by THERMAR, Inc., an Arizona corporation she controls.

8. Leonard S. Shoen, at all material times, was the beneficial owner of 2,083.55 shares of Amerco stock held of record by L.S.S., Inc., an Arizona corporation he controls. Leonard S. Shoen was the founder of U-Haul and was Chairman of the Board of Amerco from its incorporation to December, 1986.

Defendants.

9. Defendant Amerco is a corporation organized and existing under the laws of the State of Nevada. Amerco's principal offices and place of business are in Maricopa County, Arizona. Amerco is a publicly-held corporation. U-Haul International, Inc. ("U-Haul") is a wholly-owned subsidiary of Amerco.

10. Edward J. Shoen, Paul F. Shoen, James P. Shoen, Aubrey K. Johnson, William E. Carty and John M. Dodds (collectively the "Director Defendants"), were each directors of Amerco in July, 1988.

11. Edward J. Shoen, at all mateiral times, was the beneficial owner of 10,107.81 shares of Amerco stock

held of record by EJOS, INC., an Arizona corporation he controls. Edward J. Shoen became the Chairman of the Board of Amerco in December, 1986 and became the President of U-Haul in February, 1987.

12. Paul F. Shoen, at all material times, was the beneficial owner of 9,055.06 shares of Amerco stock held of record by PAFRAN, Inc., an Arizona corporation he controls. Paul Shoen is President of U-Haul, the service arm of the Amerco Affiliated corporations.

13. James P. Shoen, at all material times, was the beneficial owner of 6,540.06 shares of Amerco stock held of record by JAPAL, Inc., an Arizona corporation he controls.

II.

THREAT TO AMERCO ON JULY 14, 1988

What the Amerco Board Knew as of July 24, 1988.

14. On July 24, 1988, the Amerco Board was aware of a number of facts that suggested a threat to the continued operation of the company. Over the course of several months preceding the weekend of July 23-24, 1988, the Board and management of Amerco had received information from various sources to the effect that two or more dissident shareholders were involved in discussions regarding an effort to sell Amerco, probably by dismantling it and selling it in pieces. The information became more detailed by that weekend, to the point that the Board could reasonably conclude that a number of shareholders had formed a group for the purpose of taking concerted action to sell or liquidate Amerco without consultation with the present Board or exiting management.

How The Amerco Board Feared Plaintiffs Would Harm The Company.

15. The Board reasonably believed that Plaintiffs' actions threatened an immediate sale or liquidation of Amerco.

16. The Board also reasonably feared that, even if Amerco were not immediately sold, Plaintiffs' actions might lead to a return to old management's practices and policies.

17. The Board also reasonably feared that corporate paralysis could result from the unabated continuation of Shoen family disputes.

18. In addition, the Board reasonably feared that further managerial instability would damage relations with employees, customers and lenders.

The Reality Behind The Threat to Amerco on July 24, 1988

19. The threat perceived by the Amerco Board on July 24, 1988 appeared to the Board as a very real threat. There was evidence to suggest that Dr. Sam Shoen was planning to take control of Amerco as early as April of 1987. While Dr. Sam was still an Amerco Director (February 1987-September 1987), he hired a prominent Phoenix securiites attorney and met with investment bankers to consider a leveraged buyout of Amerco. He also met with two companies that were interested in acquiring Amerco. Dr. Sam disclosed none of these activities to the other members of the Amerco Board. In early 1988, Dr. Sam shifted his focus and met repeatedly and without the knowledge of the Defendant Directors with Bear Stearns in a plan to discuss and consider the formation of a dissident shareholder group, wrest control of the Amerco Board, and promptly sell Amerco or liquidate it. On July 24, 1988, the Amerco Board perceived an imminent threat to the continuing existence of Amerco as an ongoing, profitable entity. On that same date, Dr. Sam and the dissident Plaintiff shareholders were in the final stages of formulating and implementing plans to gain control of Amerco.

III.

THE BOARD'S RESPONSE TO THE THREAT

Requests for Information.

20. During the weekend of July 23-24, 1988, various members of the Amerco Board and certain members of senior management met and considered their receipt of information regarding possible action by the dissident shareholders. Based on the available information, this group reasonably concluded that the dissident shareholders posed a potential threat to the effectiveness and policies of the corporation, including the possibility they would act in a manner not in the best interests of all the shareholders, and the group therefore requested outside counsel to advise them in connection with this matter.

Legal Advice.

21. The various directors and management of Amerco then contacted Jock Patton of Streich, Lang, Weeks & Cardon to obtain legal advice regarding an evaluation of the threat and an appropriate response. Mr. Patton is an experienced securities lawyer with special expertise in the corporate takeover area.

Consideration Of Options.

22. Mr. Patton advised the working group that shareholders representing a majority of the outstanding shares could, without notice to anyone except such holders, act through a consent resolution to take essentially any corporate act, including removal and replacement of the Board, causing a merger with a third party, or effecting a sale of assets. Such acts might not be in the best interests of all the shareholders.

23. Mr. Patton advised the wording group of a series of at least seven possible alternatives which were available to address the threat. After hearing the presentation of

counsel, the group decided to pursue three alternatives to propose to the Board. These were (a) adoption of a "super-majority" provision requiring a ⅔ vote of shareholders for any revolutionary change such as a merger or sale, (b) authorization of an additional 100,000 shares of common stock for possible use in a future transaction, and (c) issuance of previously authorized but unissued shares to certain Key Employees to ensure their dedication and loyalty and to stabilize the voting situation. The group determined not to pursue other possible alternatives recommended by Mr. Patton.

24. On the evening of July 24, a formal Board of Directors meeting was convened at which all Directors were present. Mr. Patton made a presentation with respect to each of the three proposals the working group had earlier determined would be recommended to the Board. These included the super-majority vote, creation of additional authorized shares, and the sale of previously authorized shares to a group of key employees. The Board asked counsel questions and discussed the pros and cons of each proposal. Mr. Patton also advised the Directors that their legal duty was to determine the nature of the threat being posed to corporate policy and effectiveness, to determine the imminency of that threat, and to take reasonable and proportionate steps to protect the shareholders' interests under the circumstances. As described below, the Board voted in favor of recommending the super-majority vote to shareholders and in favor of adopting the Key Employee Plan. The Board voted against the creation of newly authorized stock.

Defensive Actions.

Key Employee Stock Purchase Plan.

25. The Board of Directors adopted a Key Employee Stock Plan, which authorized the sale of 8,099 shares of Amerco stock to five key employees selected by the Board of Directors. Those key employees were Gary B. Horton,

the company's long-time treasurer; John Dodds, Executive Vice President and head of U-Haul's entire field operations; Henry Martin, head of U-Haul's insurance operations; Harry DeShong, Jr., Executive Vice President in charge of marketing; and Gary V. Klinefelter, General Counsel of U-Haul. Each of these employees purchased 1,620 shares of Amerco stock, except Mr. Klinefelter, who purchased 1,619 shares.

26. The Key Employee Stock Purchase Plan was adopted by the Board both to ensure the loyalty and dedication of Key Employees as well as to create a buffer group of shareholders for the purpose of stabilizing the situation between the dissident shareholders and management. The five Key Employees made the stock purchase with the intention of making a profit on the stock in the event Amerco was successful in the future. The Board was given a proxy to vote the shares purchased by the Key Employees.

27. The Board determined the price of the shares to be sold to the five Key Employees and they were sold for par value down with a legally binding and enforceable promissory note given for the balance.

28. The $2,715 price per share was fair and was a middle ground figure based on the appraisal by American Appraisal Associates. In addition, previous management had never paid more than $950 per share for Amerco stock other than once in the context of a settlement agreement.

29. The Key Employees could meet the scheduled interest and principal obligations on the notes by selling some shares back to the company or to an ESOP which was in the process of being established. As payments came due, the Key Employees could sell a sufficient number of shares to meet the obligations and, if the value of the shares increased, they would stand to profit.

30. The remaining actions taken by the Board of Directors on July 24, 1988 were unrelated to any takeover issues and had no anti-takeover effect that was aimed at Plaintiffs.

31. Following the Board meeting, a Shareholders' meeting took place, and the shareholders amended the Amerco Charter in accordance with the recommendations of the Board.

31. On July 25, 1988, another meeting of the Amerco Board took place. The Board determined to authorize an "Odd Lot Tender Offer" to Purchase at a price of $2,715 all shares held by holders of fewer than 100 shares. There was no anti-takeover purpose or effect of the tender offer. The Board did determine to recommend authorizing the creation of an additional 7,500 shares to fund the ESOP.

33. Several days later, on July 29, the Board adopted a Rights Plan. It was ultimately accepted by the Board after numerous presentations by counsel and the determination by the Board that it was not detrimental to shareholders but simply forced negotiaions "to come through the front door," i.e., through appropriate corporate channels.

34. On August 3, 1988, the proxy earlier granted by the Key Employees to the Board was revoked. After the super-majority provision was adopted, and after the Rights Plan was in place, there was no ability on the part of the employees alone to change control. Accordingly, they could be permitted to serve the buffer purpose which originally was envisioned and the Board therefore decided they should have the right to vote the shares.

35. The actions taken by the Board of Directors of Amerco on July 24, 25, 26, 29 and August 1, 1988, were taken in good faith, for proper corporate purposes, and were not done for the purpose of entrenching management of the company. Moreover, they were the only immediately available effective means of protecting the policies and effectiveness of the corporation.

IV.

IRREPARABLE HARM TO AMERCO FROM A RETURN TO L.S./DR. SAM SHOEN MANAGEMENT

36. Plaintiffs will not suffer irreparable harm if the preliminary injunction is denied. Amerco, however, could suffer serious, irreparable harm if the Plaintiffs' group, led by L.S. Shoen and Dr. Sam Shoen, was allowed to return to management and to implement old management policies, or if they were given the opportunity to sell Amerco either in whole or in part or to dismantle it and sell it piecemeal.

V.

BALANCE OF HARDSHIPS

37. The denial of a preliminary injunction will cause no significant hardship to Plaintiffs, to Amerco, or to any of Amerco's shareholders. The company is successful and profitable under current management and any delay occasioned by waiting for this matter to go to trial will not cause any significant hardship to Plaintiffs.

38. The issuance of a preliminary injunction, however, could cause a substantial hardship to Defendants, to Amerco, and to its employees as this would give Plaintiffs the opportunity to take control of Amerco.

39. If Plaintiffs replace current management, this could have a detrimental effect upon Amerco, its employees and shareholders.

VI.

EXTRANEOUS MATTERS RAISED BY PLAINTIFFS

Form Builders.

40. Amerco's business relationship with Form Builders is not relevant in these proceedings and should be addressed at the trial of this matter.

Dispute Over Shoen Family Estate Plans.

41. Facts relating to the Shoen Family Estate Plans, and disputes relating to the trusts and personal holding companies, are irrelevant to the present proceedings.

CONCLUSIONS OF LAW

1. If any of the above-stated findings of fact is deemed a conclusion of law, it is incorporated here as if set forth at length.

2. Plaintiffs seek by this Motion to preliminarily enjoin the effectiveness of the sale of the 8,099 shares of stock pursuant to the Key Employee Stock Purchase Plan. To obtain such relief, Plaintiffs must submit sufficient evidence to warrant a finding by the Court as to each of the following: (a) irreparable injury to the Plaintiffs will result if the injunction does not issue; (b) a balance of the hardship favors Plaintiffs; (c) public policy favors the injunction; *and*, (d) that there is a strong likelihood that Plaintiffs will succeed on the merits.

3. The Court finds that Plaintiffs have failed to satisfy their burden as to any of the four factors necessary to the granting of a preliminary injunction.

4. First, Plaintiffs have failed to establish that they or Amerco will suffer irreparable injury if injunctive relief is not granted. The Court cannot find any reason to conclude that injury would result if an injunction did not issue at this stage of the proceeding. The only result from a decision not to issue the injunction is the enfranchisement of purchasers of 8,099 shares of stock. These purchasers are all key employees whose future success and prospects are linked to the future success and prospects of the company and they have the right to vote their shares as they see fit, including aligning themselves with either side in this dispute, or on the side of any new groups which may emerge.

5. Second, the Court concludes that the balance of hardships does not favor Plaintiffs. If the Court were to grant the requested Injunction before there has been a trial and a decision on the merits, control of Amerco could immediately shift abruptly which in turn could result in financial detriment to Amerco, its employees and stockholders.

6. With regard to the third factor, the Court concludes that public policy does not favor the injunction as the Court believes that issuance of a preliminary injunction at this stage of the proceedings could be injurious to Amerco, its employees and stockholders.

7. Finally, the Court does not find a strong likelihood that Plaintiffs will succeed on the merits.

8. Based on the information available to the Board on July 24, 1988, it reasonably could be concluded that the Plaintiffs were pursuing an effort to take control of Amerco and that, if they obtained control, they posed a threat that they would act in a manner not consistent with the best interests of all shareholders and the company. Under those circumstances, the Board has not only the right, but also the obligation, to take steps to ensure that a harmful takeover did not occur.

9. Adoption of the Key Employee Stock Purchase Plan was proper in all respects, was done in good faith, and constitutes a valid exercise of the Board's business judgment. It serves to promote the loyal service of key employees of Amerco as well as serving the purpose of placing stock in the neutral hands of non-Shoen family members, which can only serve to stabilize what otherwise is a constantly shifting situation where establishment of a majority position may depend on the whim of disgruntled family members. The sale of stock to reward and provide incentives to continued employment of key employees, coupled with the ancillary effect of stabilizing the governance of a corporation by the introduction of non-

aligned, neutral shareholders, is a proper means to achieve a proper corporate goal.

10. Finally, the Court concludes that the sale of the Amerco stock to the key employees was conducted in full compliance with Nevada law. Amerco received in cash the par value of all shares of stock sold. For the balance of the purchase price, each purchaser signed a valid, binding and legally enforceable promissory note by which he agreed to pay the balance due on the contract to purchase the stock. Although the note is non-recourse, it is fully secured and the Court finds nothing unusual or improper about the use of such a secured note. Accordingly, the sale of stock complies fully with Nevada law.

Questions concerning the conduct of Form Builders business as well as disputes among Shoen family members relating to estate plans, trusts, and personal holding companies are not relevant to the issue of whether a Preliminary Injunction should issue and to the extent that these matters may be relevant at all, they should be addressed at the time there is a trial on the merits.

DATED: Feb. 6, 1989

/s/ Norman D. Ball, Jr.
NORMAN D. BALL, JR.
Judge of the
Superior Court

APPENDIX D

COURT OF APPEALS
OF ARIZONA
DIVISION 1, DEPARTMENT B

No. 1 CA-CV 89-140

SAMUEL W. SHOEN, M.D.; MARY ANNA SHOEN-EATON; CECILIA M. SHOEN HANLON; KATRINA M. SHOEN; THERESA M. SHOEN; LEONARD S. SHOEN; and the following Arizona corporations: SAMWILL, INC.; CEMAR, INC.; KATTYDID, INC.; THERMAR, INC.; and L.S.S., INC.,

Plaintiffs-Appellants,

v.

EDWARD J. SHOEN; PAUL F. SHOEN; JAMES P. SHOEN; AUBREY K. JOHNSON; WILLIAM E. CARTY; JOHN M. DODDS; GARY B. HORTON; HENRY E. MARTIN; HARRY B. DESHONG, JR.; GARY V. KLINEFELTER; AMERCO, a Nevada corporation; JIM WHITE I-X; JOHN DOES I-X; XYZ CORPORATIONS I-X; and ABC PARTNERSHIPS I-X,

Defendants-Appellees.

Sept. 18, 1990
Review Denied Feb. 20, 1991

OPINION

KLEINSCHMIDT, Judge.

This case arises out of a struggle for control of Amerco Corporation. It is an appeal from the trial court's denial

of a preliminary injunction sought by a group of Amerco shareholders to cancel the issuance of certain voting stock, to cancel acts based on the issuance of such stock, and to preclude further voting of the stock in question. We affirm the order of the trial court denying the injunction.

Amerco, a Nevada corporation, owns U-Haul Corporation, which is in the business of renting moving trucks and moving equipment. The business was founded some forty-five years ago by Leonard S. Shoen, who, over a period of time, gave his children most of his Amerco stock.

We will refer to the plaintiffs as the "dissident stockholders' group" and to the defendants as the "directors' group." The dissident stockholders' group is comprised of Leonard S. Shoen; six of his children, including Dr. Samuel W. Shoen; and seven Arizona corporations controlled by these family members. The directors' group includes three of Leonard S. Shoen's sons, including Edward J. Shoen; five stockholder-officers of Amerco; three directors of Amerco, one of whom is also a stockholder-officer; and Amerco itself. Michael Shoen is a member of the dissent stockholders' group although he is not a party to this action. Leonard Shoen's minor son, Scott Shoen, owns a beneficial interest in 1,835.94 shares of Amerco stock which is held in trust by the United States National Bank of Oregon. Scott Shoen's shares are now aligned with the dissident stockholders' group, but neither Scott nor the bank is a party to this action. Likewise, Mark Shoen and Sophia Shoen are members of the directors' group but are not parties to this action.

For reasons that will emerge, the date July 24, 1988, is significant in this case. As of that day, the dissident stockholders' group, exclusive of the 1,835.94 shares held in trust for Scott Shoen, owned a total of 45,636.48 shares of the company's stock which represented 49.66 percent of the total outstanding shares. The directors' group, again exclusive of the shares held in trust for Scott Shoen, owned a total of 42,086.73 shares representing 45.80 percent of

the total outstanding shares. Stockholders outside the family owned 2,341.85 shares which was 2.54 percent of those outstanding. Scott Shoen's interest represented 2.00 percent of the outstanding shares. In addition to the 91,901 outstanding shares, the corporation retained 8,099 treasury shares, making a total of 100,000 authorized shares.

Leadership of Amerco has shifted over the past few years, with each group representing different management styles and corporate goals. Family members have vacillated in their alliances. At the time of the events of interest here, however, the groups were aligned as set forth above. The dissident stockholders' group insists that as of July 24, 1988, the trustee for Scott Shoen was affiliated with their coalition, but this is disputed by the directors' group. We will discuss this secondary dispute in more detail below.

The events at the heart of this dispute occurred over the course of a few weeks in July 1988. On July 17, 1988, all the members of the dissident stockholders' group, except the trustee for Scott Shoen, met and signed an informal, handwritten agreement to join together to "maximize the value and liquidity of their interests in Amerco, and, if feasible at an acceptable value, to investigate a sale of Amerco at the earliest possible opportunity."

In the days following July 17, 1988, Edward J. Shoen, President of Amerco and Chairman of the Board of Directors, became increasingly concerned that the dissident stockholders' group might be planning a hostile takeover or some other action involving Amerco. His suspicion was based on bits and pieces of information about members of the dissident stockholders' group meeting with investment bankers, lawyers, and consultants known for their expertise in the areas of corporate takeover and restructuring. Several Shoen family members reported that the purpose of these meetings was to pursue a sale or breakup of Amerco. Edward J. Shoen had been told that the dissident stockholders' group had contacted an attorney who specialized in representations involving the breakup of

companies. Efforts to obtain additional explicit information from members of the dissident stockholders' group were rebuffed.

Acting on his suspicions, Edward J. Shoen organized several meetings over the weekend of July 23 and 24 with Amerco board members, in-house counsel, and outside attorneys. The meetings were held to devise a strategy to retain control of the corporation. The directors' group took several measures to ensure their control and to preserve the status quo.

First, on July 24, and prior to any formal board action, the five Shoen siblings in the directors' group entered into a written voting trust agreement which provided that for a period of thirty months, the trust members would: (1) vote their stock as a block as directed by a majority of the five members; (2) vote against any corporate sale or merger not unanimously approved; and (3) give James P. Shoen their proxies which allowed him to vote the shares of others in the group if either the number of shareholders attending a meeting was insufficient to produce a majority vote or the shareholders failed to instruct James P. Shoen how they wished the shares voted. The proxies were to be voted against any action which would result in the merger or dissolution of the company, absent unanimous consent otherwise.

The second action by the director's group was to convene a board of directors meeting on the evening of Sunday, July 24, 1988. The voting trust agreement adopted earlier that day was neither discussed at the meeting nor disclosed to the board. At the meeting, based on outside counsel's recommendation, the board adopted a Key Employee Stock Purchase Plan applicable to five senior Amerco employees. The board valued the 8,099 treasury shares held by the corporation at $2,715 per share. These shares were then committed to the plan and were sold to the five key employees. The price was based

on an appraisal by American Appraisal Associates. Each key employee was required to make a down payment in the amount of the par value of the stock of $100 per share, which amounted to $162,000 each for four of the key employees and $161,900 for the fifth. Edward J. Shoen financed the entire $809,900 down payment for these shares by writing a check from his children's conservatorship funds to each key employee. The balance of the amounts due from the key employees was evidenced by five-year non-recourse promissory notes secured by a pledge of the newly issued stock. As part of the Key Employee Stock Purchase Plan, each key employee was required to grant the board a five-year irrevocable proxy to vote the shares purchased. The board, in turn, gave Edward J. Shoen exclusive authority to vote the proxies. By mutual agreement, these proxies were, however, subsequently revoked on August 3, 1988.

The board also approved outside counsel's suggestions to issue 100,000 shares of preferred stock and to require a two-thirds "supermajority" vote to effect any significant change in the company, such as a merger or sale of substantially all assets. Additional suggestions by outside counsel were considered and rejected. These included the adoption of a "fair price" provision in the corporate charter to prevent a majority from obtaining a control premium without sharing it with the minority. If adopted, such a provision would require that if a large portion of the company were sold, the price paid for all shares must be the same. The board also rejected the suggestions that directors' terms be staggered, and that all or part of the company be sold to a "white knight" i.e., the transfer of a block of stock to a friendly company to deprive the dissident stockholders' group of the ability to take over Amerco. The board also declined to issue an additional one hundred shares of common stock for possible use in a merger or for defensive activity. The meeting then ended.

As a consequence of the activities of July 24, Edward J. Shoen was authorized to vote those shares held by the employees under the Key Employee Stock Purchase Plan and James P. Shoen was authorized to vote those shares the siblings had placed in the voting trust for a total of 50,185.73 shares, a majority of the 100,000 outstanding shares of Amerco.

After the board meeting, Edward J. Shoen and James P. Shoen held a stockholders' meeting and, pursuant to the Nevada shareholder consent procedure, adopted two amendments to the Amerco Articles of Incorporation: (1) authorizing the issuance of 100,000 shares of preferred stock, and (2) imposing a two-thirds "supermajority" requirement for significant corporate change.

On Monday, July 25, the board met again and recommended to the new majority shareholders that they authorize an additional 7,500 shares of common voting stock to bring the total shares of such stock to 107,500. These additional shares were to be available for an Employee Stock Ownership Plan unrelated to the board's efforts to consolidate its control of the eorporation. This recommendation was approved later that same day by Edward J. Shoen and James P. Shoen, by means of the voting trust and the proxies they held. A few days later, the board attached a "poison pill" to the preferred stock which had previously been authorized. Referred to as a "rights plan," it granted the holder of the preferred stock the right to buy shares in any acquiring company at half price, making an unapproved takeover economically disadvantageous to the acquiring company.

On that same Monday, July 25, wholly unaware of the directors' and stockholders' actions of July 24, the dissident stockholders' group filed a Schedule 13D with the Securities and Exchange Commission disclosing their July 17 handwritten agreement, and mailed a copy of the

schedule to Amerco.[1] The dissident stockholders' group also retained an investment banking firm to determine Amerco's stock value and to report on "alternatives for maximizing the value and liquidity of all Amerco stock."

On the same day, July 25, the dissident stockholders' group, except the trustee for Scott Shoen, executed a shareholder consent to appoint additional directors and to amend Amerco's By-Laws to protect existing shareholders' rights. The consent was forwarded to the trustee for Scott Shoen who signed it on July 27.

A few days later, still unaware of the actions taken by the directors' group, the dissident stockholders' group delivered to Amerco's secretary the signed shareholders' consent. Only then did the dissident stockholders' group discover what the board had done on July 24 and 25. Amerco's secretary rejected the consent and failed to answer repeated requests for information and details about recent stock issuance from the dissident stockholders' group. Shortly thereafter, the dissident stockholders' group commenced this litigation.

Following an extensive hearing, the trial court denied the request for a preliminary injunction. It found virtually all of the disputed facts in favor of the directors' group and concluded that the law favored their position in every respect. This appeal followed. We will discuss the trial court's findings in more detail below.

STANDARD OF REVIEW

The scope of our review of an order denying a preliminary injunction is limited to determining whether the trial court committed a clear abuse of discretion. *Financial*

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[1] Stockholders who acquire more than 5 percent of certain classes of stock in a corporation are required to file a Schedule 13D with the Securities and Exchange Commission to provide certain information regarding their acquisition of stock. 15 U.S.C.A. § 78m(d) (1981, Supp.1990).

Assocs., Inc. v. Hub Properties, Inc., 143 Ariz. 543, 545, 694 P.2d 831, 833 (App.1984); *American Credit Bureau, Inc. v. Carter*, 11 Ariz.App.145, 147, 462 P.2d 838, 840 (1969); see also *Clay v. Arizona Interscholastic Ass'n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989). Unless the trial judge either made a mistake of law concerning the duties of corporate directors or clearly erred in finding the facts or applying them to the legal criteria for granting an injunction, we must affirm. *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 260-61 (2d Cir.1984); Rule 52(a), Arizona Rules of Civil Procedure.

The party seeking a preliminary injunction is obligated to establish four traditional equitable criteria:

1) A strong likelihood that he will succeed at trial on the merits;

2) The possibility of irreparable injury to him not remediable by damages if the requested relief is not granted;

3) A balance of hardships favors himself; and

4) Public policy favors the injunction.

Justice v. Nat'l Collegiate Athletic Ass'n, 577 F.Supp. 356, 363 (D.Ariz.1983); *Burton v. Celentano*, 134 Ariz. 594, 595, 658 P.2d 247, 248 (App.1982).

The critical element in this analysis is the relative hardship to the parties. *Justice*, 577 F.Supp. at 363. To meet this burden, the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and "the balance of hardships tip sharply" in his favor. *Id.* The type of injunction sought by the dissident stockholders' group is not a remedy favored by the courts, especially because it goes beyond simply maintaining the status quo pending a trial on the merits. See *Burton*, 134 Ariz. at 595, 658 P.2d at 248; *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir.1975).

THE TRIAL COURT'S FINDINGS

The trial judge issued lengthy Findings of Fact and Conclusions of Law as to the four equitable criteria. Some of the evidence which he reviewed concerned the relative health of the company under the former management of the dissident stockholders' group as opposed to the company's current condition.

The trial judge found that from the information available to it, the board could reasonably have believed that the dissident stockholders' group intended to liquidate the corporation without consulting the board or the management of the corporation. He concluded that the board reasonably feared that even if the company were not sold, the dissident stockholders' group might force a return to old management practices and policies and that the board reasonably feared that unabated family disputes would lead to corporate paralysis. He also found that the board reasonably feared that further managerial instability would damage relations with employees, customers, and lenders.

The trial judge found that the price fixed for the shares of stock issued in conjunction with the Key Employee Stock Purchase Plan was a fair middleground figure. The trial judge determined that the adoption of the Key Employee Stock Purchase Plan was proper, done in good faith, and was a valid exercise of the board's business judgement. He found that the plan served to promote the loyal service of key employees and, by placing stock in the neutral hands of non-family members, stabilized a constantly shifting situation where the maintenance of a majority position depended on the whim of disgruntled family members. He concluded that the actions taken by the board were done in good faith and for proper corporate purposes, were not done for the purpose of entrenching management, and were the only immediately available effective means of protecting the corporation.

The trial judge found that the dissident stockholders' group had failed to satisfy its burden as to any of the factors necessary to the granting of a preliminary injunction. He concluded that the dissident stockholders' group would not suffer irreparable harm if the injunction were denied, but the company could suffer serious irreparable harm if the dissident stockholders' group was allowed to return to management or was given the opportunity to sell all or part of the corporation. He also found that an abrupt shift in management could result in financial detriment to the corporation, its employees, and stockholders. The trial judge believed public policy did not favor this and that the possibility that the dissident stockholders' group would succeed on the merits was not strong.

One area in which the trial court made no explicit finding of fact relates to whether, at the time the directors were taking steps to prevent the dissident stockholders' group from gaining control, the dissident stockholders' group in fact owned a majority of the outstanding shares of stock in the corporation. The dissident stockholders' group argues that if the directors of a corporation cause stock to be issued which has the effect of shifting control from a former majority of shareholders to the directors, that action is invalid as a matter of law. See *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401 (Del.1985). This argument is based on the premise that the disident stockholders' group owned a majority of the outstanding shares on July 24, 1988, the date the board voted to create the Key Employee Stock Purchase Plan and took other steps to consolidate its control.

The directors' group strenuously disputes the truth of this premise. It insists that the shares that were held in trust for Scott Shoen by the United States National Bank of Oregon were not then aligned with the dissident stockholders' group, and that without them the dissident stockholders' group was not the majority shareholder. The di-

rectors' group acknowledges that on July 27, the trustee participated with the dissident stockholders' group in signing a Written Consent of Shareholders of Amerco in Lieu of Meeting for the purpose of electing new directors. The directors' group points out, however, that when the dissident stockholders' group met on July 25 to sign the Schedule 13D, group members discussed whether they controlled a majority of the outstanding shares. While the record on this point is confusing, it appears that the dissident stockholders group did not actually believe it controlled a majority of the outstanding stock as of that date. In any event, the trust officer who ultimately signed the Written Consent of Shareholders of Amerco in Lieu of Meeting had not made up her mind to do so as of July 24. She actually signed the consent on July 27.

The dissident stockholders' group, in its reply brief, continues to assert that it had the majority of outstanding shares at the time the board took the steps to thwart a takeover, but it does not reply to the specific facts pointed to by the directors' group that support a contrary conclusion. As we have observed, the trial judge made no direct finding one way or another on this point. We do not believe the dissident stockholders' group clearly established its point on this issue. Consequently, some of the cases in which it relies do not directly support its position because the cases involve action taken to deprive majority shareholders of control.[2]

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[2] In addition to *Frantz Mfg. Co.*, 501 A.2d 401; see also *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204 (8th Cir.1976); *Hatch v. Emery*, 1 Ariz.App. 142, 400 P.2d 349 (1965); *Kullgren v. Navy Gas & Supply Co.*, 110 Colo. 454, 135 P.2d 1007 (1943); *Canada Southern Oils, Ltd. v. Manabi Exploration Co.*, 96 A.2d 810 (Del. Ch.1953); *Andersen v. Albert & J.M. Anderson Mfg. Co.*, 90 N.E.2d 541 (Mass.1950).

THE LAW—DEFENSES TO CORPORATE TAKEOVERS

The dissident stockholders' group takes the position that when directors of a corporation issue new stock, they must treat all the stockholders fairly and may not issue stock to themselves or to their nominees for the purpose of gaining or retaining control of the corporation. The dissident stockholders' groups cites considerable authority for this proposition, no doubt much of it entirely valid in the context in which it was decided. In the last decade or so, however, a refinement to this rule has grown out of the rash of hostile takeover attempts which American corporations have experienced. The phenomenon, and the evolution in the law to which it has led, is well discussed in *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d at 258.

In Norlin, the director of a corporation sought to forestall a hostile takeover by, among other things, creating an employee stock option plan which concentrated greater voting power in the hands of the board. The trial court granted an injunction against the board's exercising control of the corporation in this manner because the board had failed to demonstrate that its action was fair and served the best interests of the corporation and its shareholders. The court concluded that the action was merely an attempt to entrench the existing board. The court of appeals, on the specific facts of that case, which included the fact that the board's action threatened to cause the New York Stock Exchange to delist the corporation's stock and the fact that the directors offered the shareholders no explanation for their opposition to the takeover, held that the issuance of an injunction was not error. While the appellate court in Norlin sustained the injunction, for the problem which confronts us, that case is significant for the rule of law that it adopts.

The court observed that a board member's obligation to the corporation and its shareholders involves a duty

of care and a duty of loyalty. The duty of care refers to the responsibility to exercise the care that a reasonably prudent person in a similar position would exercise under similar circumstances. The duty of care is evaluated according to the "business judgment rule," which precludes judicial inquiry into actions taken by a director in good faith and in the exercise of honest judgment in the legitimate and lawful furtherance of a corporate purpose.

The director's second duty, that of loyalty, springs from the prohibition against self-dealing that is inherent in a director's fiduciary relationship with the corporation and its shareholders. Once there is a prima facie showing that a director is personally interested in a corporate transaction, the business judgment rule does not apply, and the burden shifts to the director to show that the decision with respect to a particular transaction is fair and serves the best interests of the corporation and the shareholders.

An earlier Second Circuit decision, *Treadway Companies, Inc. v. Care Corp.*, 638 F.2d 357 (2d Cir.1980), upon which the court in Norlin relied, contained the observation:

> The cases in this area demonstrate that the courts are sensitive to the risks of self-dealing and abuse which inhere in corporate stock transactions that are intended to affect control. But at the same time courts have recognized that in certain circumstances, it is proper for management to cause the corporation to enter into such transactions. The law in this area is something less than a seamless web; some of the cases are not easily reconciled. We have concluded, however, that far from constituting an area that is beyond the purview of the business judgment rule, these cases are best reconciled by reference to the analysis typically employed under that rule.

Id. at 382.

The First Circuit has adopted the same rule expressed in lightly different terms. In *Heit v. Baird*, 567 F.2d 1157 (1st Cir.1977), a case involving the issuance of stock to impede a hostile takeover, the court said that a director may not exploit his official position to manipulate the issuance of shares solely to perpetuate his own control of the corporation. However, an issuance of stock that has the collateral effect of enhancing the power of the incumbent management is valid if the transaction has as its principal purpose some proper corporate goal. The court said that management not only has the right, but the duty, to resist attempts to win control of the corporation which, if successful, would harm the corporate enterprise. See also *Horwitz v. Southwest Forest Indus., Inc.*, 604 F.Supp. 1130 (D.Nev.1985).

As the court of appeals noted in Treadway, other courts have approached the question in a slightly different manner. For example, in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del.1985), the Supreme Court of Delaware considered whether a corporation could make a tender offer for the purchase of its own shares but exclude the corporate raider from participating in the tender offer. The court said that the rule that should govern such situations is as follows: because of the danger that a board might be acting primarily in its own interests, the courts have a duty, before applying the business judgment rule, to require the directors to show that they had reasonable grounds for believing that corporate policy and effectiveness were threatened by the takeover attempt and that the board's action was reasonable in relation to the threat posed. That burden is satisfied by a showing that the directors were not acting solely or primarily out of a desire to perpetuate themselves in control and that they undertook a reasonable investigation of the circumstances. In Unocal, the court found that board's defensive action was proper. See also *Paramount Communications, Inc.. v. Times, Inc.*, 571 A.2d

1140 (Del.1989) and 3A Fletcher Cyc. Corp. § 1041.3 (Perm.Ed.1986, 1989).

In our opinion, there is not a great deal of difference between Norlin and Unocal. Certainly in this case, the findings and conclusions of the trial court address the proper issue, however, the burden upon the directors to justify their actions is characterized. We choose to use the analysis employed in Norlin, Treadway, and Heit. Any law to the contrary, including *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del.Ch.1988), upon which the dissident stockholders' group relies, we believe to be distinguishable on the facts or we decline to adopt.

We turn then to an examination of whether the directors' actions, as found and characterized by the trial court, can survive the scrutiny of the test of fairness and of being in the best interest of the corporation and its shareholders. Our examination requires us to determine as well whether the trial judge erred in finding the facts as he did. We repeat that it is immaterial in this regard that we might have found the facts differently, as long as the trial judge did not clearly err.

The directors unquestionably had a personal interest in the transaction. While the trial court made no such express finding, any conclusion to the contrary would be untenable. So too, the trial court's finding that the board's actions were not undertaken for the purpose of entrenching management, as far as it goes, is not quite precise enough. These infirmities are not, however, fatal to the trial court's decision. The fact that the directors had a personal interest in the transaction simply triggers the inquiry as to whether their actions were fair and in the best interests of the corporation and its shareholders. As to entrenching themselves, that was the potential collateral result of the board's actions in every case upon which we rely. The important point is that even if the action entrenches the board, it is permissible if it also serves a proper corporate purpose. See *Heit*, 567 F.2d at 1161.

The idea that entrenchment was not the sole reason for the board's action in this case is inherent in the trial court's findings. The conclusions that the board's actions were fair, were undertaken for the best interests of the corporation and the shareholders, and were reasonable in view of the threat posed are either expressly made by the trial judge or inhere in his findings. While the dissident stockholders' group insist that it was not bent on a hostile takeover and vigorously attacks the trial judge's conclusions, we cannot say that the trial judge clearly erred in finding the facts as he did. While the trial court did not articulate its conclusions of law in terms of the decisions which we believe control this question, its findings support its decision under what we believe is the governing law.

FAILURE TO DISLOSE THE VOTING TRUST AGREEMENT TO THE BOARD

The dissident stockholders' group argues that the failure to disclose to the board that five Shoen siblings had entered into a voting trust agreement deprived the board of information that it needed to make an intelligent decision about the other defensive measures the board was contemplating, and thus invalidated the board's action of July 24.

The dissident stockholders' group, in its opening brief, alludes to the voting trust agreement in detail and attaches a copy of it as Appendix C to the brief. The directors' group states that the agreement is not part of the record. In its reply brief, the dissident stockholders' group discusses the details of the voting trust agreement without answering the assertion that it is not part of the record. The trial judge did not refer to the voting trust agreement in his Findings of Fact and Conclusions of Law. It is, however, implicit in his finding that the Key Employee Stock Purchase Plan was properly adopted that nothing about the voting trust agreement should invalidate the board's actions of July 24.

We believe that the voting trust agreement is properly before us. It is found in the appendix to the opening brief immediately following the Schedule 13D which the director's group filed with the Securities and Exchange Commission on August 3, 1988. The voting trust agreement is extensively described in the Schedule 13D, and that document recites that the voting trust agreement is attached to it as an exhibit. The Schedule 13D is exhibit 13, received into evidence on December 13, 1988, and is also exhibit 204 to the deposition of Paul Shoen of August 22, 1988, which was filed with the trial court and is part of the record.

The gist of the dissident stockholders' group's argument is that the voting trust agreement gives each party to it an absolute veto over any proposal to merge or sell Amerco until January 1, 1991, the date the agreement is due to expire. This, the group says, in conjunction with the adoption of the Key Employee Stock Purchase Plan, which assured that the directors' group controlled a majority of the outstanding shares, gave the five siblings who signed the voting trust agreement the power to "control Amerco absolutely, with no corporate action of consequence possible without the unanimous approval of them all."

The dissident stockholders' group cites the testimony of several members of the board who had not been advised of the existence of the voting trust when they voted for the adoption of the Key Employee Stock Purchase Plan. The dissident stockholders' group argues that the information about the voting trust was material to the board's decision. One board member, John M. Dodds, testified that on July 24 he knew nothing of the voting trust agreement. When asked whether it would be appropriate to give a 10 percent shareholder a veto over a transaction involving the sales of the company, he said that would be wrong.[3]

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[3] Edward J. Shoen owned 10 percent of Amerco's shares.

Another director, Aubrey K. Johnson, was also unaware of the voting trust agreement. He said that as a director he would not give a veto power over the sale of the corporation to one shareholder. When asked if it would have been important to him to have known of the voting trust agreement, he said that based on his knowledge of the individuals concerned, it was his personal opinion that the agreement would never be enforced. He said that had he known of the agreement it would have had no significance to him in terms of the action he participated in on July 24 in recommending the requirement for a two- thirds majority of shareholders to approve a significant corporate change.

The dissident stockholders' group cites a single case, *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del.1988), in support of its argument on this point. In that case, the Supreme Court of Delaware considered the effect of a failure of several members of corporate management to advise the board of their personal financial interest in a corporate restructuring and of their having advised one potential purchaser of another's bid. The court concluded that this misconduct, which was extensive, irremediably tainted the design and execution of the whole restructuring transaction.

The directors' group takes the position that the information about the voting trust agreement was not material to the board's actions of July 24. It points out that its opponents have cited no Nevada or Delaware authority to the effect that directors have a duty to inform the board of their participation in such an agreement. The directors' group concedes that there would have been a duty to tell the board of the agreement if some director had a personal financial stake in a specific transaction that would be influenced by the board's action.

The chief argument which the directors' group makes on this point, however, is that the Key Employee Stock Pur-

chase Plan and the voting trust agreement did not have the effect that the dissident stockholders' group says they did. The directors' group points out that the proxy given to Edward J. Shoen under the Key Employee Stock Purchase Plan would remain in effect "unless otherwise determined by board action." This being true, it says, if Edward J. Shoen tried to block action that the majority of the board favored, all the board had to do was remove his power to vote the 8,099 shares that had been issued pursuant to the Key Employee Stock Purchase Plan.

The dissident stockholders' comeback is that as far as the directors knew when they voted on the measures adopted on July 24, Edward J. Shoen owned only 10 percent of the outstanding shares of Amerco when in fact, by virtue of the voting trust, he had a proxy to vote 45.80 percent of the stock.[4] Had the board known this, the dissident stockholders' group suggests, it would not have acted as it did.

The dissident stockholders' group, on these briefs and this record, fails to convince us that the preliminary injuction should have been granted because the voting trust agreement was not disclosed to the board. While we would not go so far as to say that the information was immaterial, the undisclosed information was not nearly as important to the board's decision as the information that was withheld in Mills. In the case before us, the directors could hardly have been ignorant of the nature of Edward J. Shoen's interest in maintaining control, even if they were not aware of the precise extent to which he had formalized that control. Further, in view of the fact that the board could withdraw the proxy given to Shoen under the Key Employee Stock Purchase Agreement, the dis-

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[4] We assume that this is an oversight on the part of the dissident stockholders' group. The voting trust agreement gives the proxies to vote the stock to James P. Shoen. The evidence reflects that James P. Shoen exercised those proxies when stockholder votes were taken.

sident stockholders' group exaggerates the extent of that control. We note that no uninformed member of the board has sought to repudiate the board's actions of July 24, and we are unadvised as to the law as it might relate to a ratification of such actions once the members of the board become aware of the voting trust. Under these circumstances, it would not be advisable for us to try and define the law of the case on this issue. Since this litigation will continue, the parties may wish to pursue and develop this issue further, both as to the facts and as to the applicable law.

ADEQUACY OF THE CONSIDERATION FOR THE KEY EMPLOYEE STOCK PURCHASE PLAN

The dissident stockholders' group argues that since the key employees to whom the 8,099 shares were issued paid for those shares with non-recourse promissory notes, the issuance of the shares was void because it was both a sham and fraud and a violation of Nevada statutes.

Under the terms of the stock purchase agreement, each of the five key employees paid cash equal to the $100 per share par value of the stock. The balance due for the stock was financed by non-recourse promissory notes. The plan provides that the payee's sole remedy for default is the recovery of the stock for which the note was issued and that the employee has no personal liability for payment. If any key employee fails to pay, the company can declare the note immediately due and payable and may redeem the stock issued by refunding what the employee paid for it.

The dissident stockholders' group argues that all of the circumstances attending the sale of the shares to the key employees, and the board's failure to investigate the ability of the key employees to pay these notes, which it suggests that none of them will ever be able to do, renders the transaction a sham and a fraud.

The directors' group counters with the argument that the trial judge found that a legally enforceable obligation does exist. It points out that there was testimony before the trial judge from a corporate attorney that the use of non-recourse notes is common in stock transactions, particularly where the purpose is to give an employee who purchases stock the benefit of a rising stock price without the burden of bankruptcy if the value of the stock fails to rise or decreases.

The directors' group also argues that the employees to whom the stock was issued promised to use their best efforts and that such a promise is not illusory, citing Calamari, The Law of Contracts §§ 14-18 (1987). It adds that since the purpose of the stock purchase plan is to generate loyalty and commitment from valued employees, the resulting benefit to Amerco is classic contractual consideration.

It also points out that each employee paid Amerco in excess of $160,000 as a down payment and that the employee could not recoup the interest on that amount were he to fail to pay for his stock and allow the corporation to receem it. This time-value of the down payment, it argues, benefits the corporation and is a detriment to the key employees. The directors' group also points out that the key employees received no security in return for the par value down payment. As a consequence, they have incurred the risk that as to that amount, nothing protects them against the general creditors of the corporation in the event the corporation cannot meet its obligations.

We conclude that the order of the trial court denying the request for a preliminary injunction ought not be reversed on the grounds that the sale of stock to the key employees was a sham or a fraud. The trial judge found that all of the key employees to whom stock was sold could meet the scheduled interest and principal obligations on the notes by selling some of their shares back to the corporation or to an Employee Stock Option Plan

that was being established. He also found that the reason for the sale of the stock was to secure the continued services of the key employees. As we have already concluded, it was not an abuse of discreton to find that such was, indeed, one of the reasons for adopting the plan.

Further, the various benefits and detriments conferred and incurred, mentioned above in our discussion of the arguments advanced by the directors' group, constitute consideration for the issuance of the stock to the key employees. Our decision is bolstered by the expert witness who testified that it was common to finance sales of stock to corporate employees with non-recourse notes. While this testimony was of a very general nature and was not specifically related to Nevada practice, it was uncontradicted. We cannot agree with the dissident stockholders' group on this record that the plan was unquestionably a sham and a fraud.

The more difficult question is whether this transaction violates Nevada statutes, and if so, the consequences of that violation. Nevada Revised Statutes section 78.210 provides inter alia:

> A corporation . . . may issue stock for cash, labor, services or personal property, or real estate of or leases thereof. Any shares issued for such consideration shall be deemed fully paid if:
>
> 1. The entire amount; or
>
> 2. Not less than the amount characterized by capital pursuant to NRS 78.270 accompanied by the legally enforceble obligation of the subscriber to pay the balance of the subscription, has been received by the corporation.

Section 78.200 provides, inter alia, that if there be a subscription default,

> the corporation may proceed to collect the amount due in the same manner as any debt due the cor-

> poration. . . . No penalty . . . may be declared . . . unless the amount due remains unpaid for 30 days after written demand.

Section 78.225 provides, inter alia:

> Where a . . . subscription . . . has been made, . . . a holder of shares of stock not fully paid shall be personally liable . . . not in excess of the amount unpaid. . . .

The dissident stockholders' group argues that these sales violate these provisions because the non-recourse notes are not "legally enforceable obligations to pay" within the meaning of section 78.210. It says that Amerco and its creditors have no legally enforceable right to hold the key employees to their obligation because the employees can simply decline to pay the balance on the notes and give back the stock. It contends that section 78.210 and section 78.225 of the Nevada statutes read together require that a subscriber to stock who has not paid cash for the full value of the stock must be personally liable for the unpaid balance or the issuance is void.

The capital stock of a corporation and the unpaid subscriptions for that stock constitute a trust fund for the benefit of the general creditors of the corporation, and where the law requires a public declaration of the amount of capital upon which the corporation operates, the general public has a right to rely on the truthfulness of such declaration. See *Thompson v. Reno Savings Bank,* 19 Nev. 103, 7 P. 68 (1885).

The directors' group insists that the stock issued to the key employees in this case is fully paid for within the meaning of section 78.210 because cash was paid for the par value of the stock and a legally enforceable obligation to pay was given for the balance of its value. We agree that the notes are enforceable contracts in the sense that if they are not paid, consequences will ensue for the key employees. They will lose their stock and

receive back the amount of money they have paid for it. If the stock was realistically valued in the first place and has held that value, or if the stock has risen in value, the corporation may enjoy a benefit, and the makers of the notes may suffer a detriment if the payments on the notes are not met. Certainly, if the stock has risen in value, it would be in the employee's interest to dispose of enough of the stock to allow them to maintain their payments on the rest. If the stock has fallen in value, however, the remedy available to the corporation has little value either to it or its creditors.

The Nevada statutes require not only that the subscription constitute a legally enforceable obligation, but also that the subscriber must bear personal liability for that obligation. The dissident stockholders' group cites not a single case, from Nevada or elsewhere, which holds that a non-recourse provision in a subscription agreement voids the entire agreement and the corporate act of issuing the stock based on the agreement. Instead, it cites several cases for the proposition that an injunction is appropriate to prevent the issuance of stock in a manner which conflicts with a statute, regardless of the extent of the harm threatened. We analyze those cases briefly.

In *Bank of New York Co. v. Irving Bank Corp.*, 139 Misc.2d 665, 528 N.Y.S.2d 482 (1988), the directors of a corporation attempted to defend against a hostile takeover by adopting a poison pill in the form of a "rights plan" that would limit the powers of any board elected as the result of an unapproved takeover. The court enjoined the execution of this scheme because it violated a statute that required restrictions on the powers of the board to be included in the certificate of incorporation.

Allen v. Prime Computer, Inc., 540 A.2d 417 (Del. 1988), dealt with a bylaw adopted by a target corporation to delay for twenty days the effectiveness of certain actions taken by shareholder consent. The court enjoined

the enforcement of the bylaw because by statute the right of shareholders to act immediately by consent could only be modified or eliminated by a proviso contained in the certificate of incorporation.

In *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966), the court enjoined the use of proxies obtained in violation of the Securities Exchange Act of 1934.

Finally, in *Schwab v. Potter Co.*, 194 N.Y. 409, 87 N.E. 670 (1909), the court held that an attempt by one corporation to create a new corporation in which the first corporation would be the sole shareholder was void as beyond the statutory powers of corporations and could therefore be enjoined.

The cases cited do not deal with the issuance of stock. They only support the limited proposition that when directors of a corporation are acting to consolidate their control, their conduct is subject to injunction if they act contrary to their authority. These cases also address situations in which an injunction appears to have been the only effective remedy the courts could provide. That is not necessarily the case here. First, there is nothing in the Nevada statutes which says that all stock issued must be paid for in full. The very existence of section 78.225 suggests the contrary. It recognizes that not all stock will be paid for in full and prescribes how a subscriber shall be treated should his unpaid balance be needed. Second, the conflict here is between the provisions of the agreement allowing for a non-recourse note and specifying that the corporation may recover the stock upon refund of the amount paid for it on the one hand, and the Nevada statute which declares that subscribers who do not fully pay for their stock are liable to the extent of the unpaid balance on the other. That portion of the agreement which conflicts with the statute may be void. In other words, it may be that in spite of the agreement between the corporation and the key employees that the obligation be non-recourse, the key employees are by virtue of

the statute personally liable to the full extent of the unpaid balance of the notes. We understand the directors' group to say as much in its brief, although it is less than clear in doing so. As the directors' group puts it, the statute "requires the imposition of personal liability for the balance of the stick price only when a debtor [sic] sues the corporation and attempts to hold its stockholders individually liable when they have not 'fully paid' for their stock." It then proceeds to assert that there is no law to the effect that an issue of stock is invalid if it is not fully paid.

The dissident stockholders' group has not replied directly to the directors' group's suggestion that the effect of the conflict between the subscription agreement and the statute is not to render the issuance of the stock void, but to render the subscribers personally liable. The dissident stockholders' group cites no authority other than the statute itself. The dissident stockholders' group did not carry its burden, either below or in this court, of showing that the Nevada statute has the consequences for which it contends. We conclude, without purporting to establish the law of the case on this particular point, that the dissident stockholders' group has not established its right to a preliminary injunction because of the way in which the employees agreed to pay for the stock. The parties are entitled to develop this issue further at trial.

SUMMARY

We adopt the rule of *Norlin Corp. v. Rooney, Pace Inc.* concerning the law as to directors' responsibilities in the face of a hostile takeover attempt. We conclude that the failure of the directors to disclose the voting trust agreement and the possible conflict between the Key Employee Stock Purchase Plan and the Nevada statutes does not mandate the issuance of a preliminary injunction. We do not purport to define the law of the case on the two latter points.

The order of the trial court denying the issuance of a preliminary injunction is affirmed.

JACOBSON, P.J., and LANKFORD, J., concur.

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. CV 88-20139

LEONARD S. SHOEN, *et al.*,
Plaintiffs,

vs.

EDWARD J. SHOEN and PAUL J. SHOEN, *et al.*,
Defendants.

Phoenix, Arizona
September 20, 1994

BEFORE THE HONORABLE THOMAS DUNEVANT, III

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Morning Session)

PROCEEDINGS

[4] THE COURT: The Court has had the director defendant's motion for directed verdict under advisement.

The director defendants have, have moved for a directed verdict on, on several grounds as follows:

That the plaintiffs have failed to present by clear and convincing evidence, evidence sufficient to, to warrant this matter going to a jury on the plaintiff's punitive damages claim, that the plaintifls have failed, as a matter of law to mitigate their damages by failing to explore or accept outstanding offers of liquidity for their stock, that the plaintiffs have failed as a matter of law to prove that the alleged entrenchment actions of director defendants proximately caused damages, that the plaintiffs have failed to plead special damages for their breach of contract claim and that the plaintiffs have failed as a matter of law to prove actual and ascertainable damages.

The Court finds as for the plaintiffs's breach of contract claim, the plaintiffs have conceded on the record yesterday that they are not making a request for punitive damages, so the issue is moot. Even if it [5] was not moot, as a matter of law the plaintiffs would not be entitled to an award of punitive damages on the contract claim.

With respect to the bases set forth in the director defendant's motions, bases numbered two through five appear on page, appear on page 2, the Court finds that reasonable minds could differ.

More specifically, those bases again are that the plaintiffs have failed as a matter of law to mitigate their damages by failing to explore, accept outstanding offers of liquidity for their stock. Plaintiffs have failed as a matter of law to prove that the alleged entrenchment actions of the director defendants proximately caused damages. Plaintiffs have failed to plead special damages for the breach of contract claim, and plaintiffs have failed as matter of law to prove actual and ascertainable damages.

There are a plethora of disputed facts in the record at this point. From those, from those disputed facts, there are many inferences that the trier of fact could draw, which is another way of saying, based upon the facts as

they are presented now, reasonable minds could differ on the facts alone. Based upon the inferences that could be drawn from those facts, reasonable minds could differ with respect to bases two [6] through five enumerated in the director defendants motion.

The determination of the facts and inferences to be drawn from those facts is a matter for the jury in this trial. For example, issues and/or arguments relating to perceived weaknesses and the methodology of L.S. Shoen's damage testimony and, and the manner and method in which the individual plaintiffs have, have valued their stock go to the weight at this point, and the jury has to decide what, if any, weight to give to, to that testimony.

I don't intend to, to list all these areas, I am just giving some examples.

Issues and/or arguments relating to whether or not the plaintiffs have reasonably made attempts to mitigate their damages, again, is a jury question.

One of the issues perhaps the jury will have to address is one of pure credibility. When the plaintiffs say they don't trust the director defendants, is there sufficient evidence in this record to persuade the jury that there is a good reason for the lack of trust. Depending on how that is answered, the jury will, will determine the facts a certain way.

There are a lot of those sorts of things that are in this record, and it would be clear error to, [7] to grant a motion for directed verdict.

Moving to Basis No. 2—excuse me, I should say Basis No. 1, which is the, which is the plaintiffs have failed to present clear and convincing evidence to submit to a jury on the claim for punitive damages. As to all of the director defendants, except for Joe Shoen, the motion is granted.

The Court notes as a preliminary matter that the burden of proof is clear and convincing evidence, which is a rigorous standard. It is a much higher standard than a mere preponderance of the evidence.

The plaintiffs in this case must prove under Nevada law, and the statute is NRV 42-005, that's the governing statute. The plaintiffs must prove by clear and convincing evidence that, that each individual director defendant is guilty of fraud, oppression, or malice, in fact, to justify punitive damages.

The Court emphasizes the words "in fact" because under the Craigo versus Circus-Circus, 786 P.2d 22, the Court goes to great lengths to indicate that, that the statute requires proof of malice in fact, not malice in law or implied malice.

For example, in California and in Arizona at least there is the argument that can be made that if there is a finding of conscious disregard of the rights [8] of the plaintiffs which results in injury, I am paraphrasing some of the language, that could be a ground for a punitive damage award. That's implied in law, malice.

Nevada has not adopted that standard. It has to be proved specifically in the facts, which is another way of saying that the required mental state, culpable mental state that has to be proved as to each individual defendant is that there was, there was this ill will, this spite, this motive, this motivation, in fact, to injure each and every plaintiff in this action.

As to all of the director defendants, except for Joe Shoen, there is little or no evidence to support those allegations. Even if there is some evidence, it doesn't come close to approaching the clear and convincing standard, which is a different way of saying, reasonable minds could not differ, that there is not ample evidence in the record to establish malice in fact.

As a matter of law the Court has to look at each individual director defendant rather than the director defendants as a board. When you consider the record as to each individual defendant, the Court cannot identify a sufficient quantum of evidence that would support this matter going to the jury.

The Court also notes that, that independent [9] legal counsel was involved in, in several aspects of the transactions that are the subject of the litigation, and that is an important factor under the law that, that can be considered and should be considered, and certainly should be considered in this case, especially with respect to all of the director defendants, except for Joe Shoen. The legal advice alone is probably enough to negate any allegation of malice aforethought on the part of the director defendants.

As I referred to them, when I say director defendants at this point, I am referring to everybody, except for Joe Shoen.

With respect to whether or not the director defendants, now I am referring to all of the director defendants, reasonably concluded that they faced a control battle, that's a disputed issue. That's a jury question, but that goes to, to the allegations of breaches of fiduciary duty. That is not the something more in fact that is required under the Nevada law to establish punitive damages.

The language in the Craigo opinion is especially important because Nevada law applies, and as I said, Nevada law is, is slightly different, at least as the Court interprets it, from Arizona law on this issue of punitive damages. [10] On page 2, excuse me, page 24 of the Craigo case, the Court highlights certain language from various appellate cases from that jurisdiction.

For example, in Warmbrodt, W-a-r-m-b-r-o-d-t, versus Blanchard, 100 Nevada 703, the Court says, "The term 'malice' as used in the statute means malice in fact and

denotes ill-will or desire to do harm for the mere satisfaction of doing it."

Citing Bader, B-a-d-e-r, 96 Nevada, page, page 359, the Court says, "The term 'malice' as used in the statute means malice in fact and denotes ill-will or desire to do harm for the mere satisfaction of doing it."

Citing to Kelly Broadcasting v. Sovereign Broadcast, 96 Nevada 188, the Court says, "In order to award punitive damages, the trial court must find substantial evidence of malice in fact."

On page 25 of the opinion, in discussing the Davis decision, the Court goes on to say, "Where the term 'malice' includes not only a malicious intention to injure the specific person harmed, but conduct evincing a conscious disregard of the probability that the actor's conduct will result in injury"—let me go back and read the entire thing so it will make sense.

"Davis has yielded to subsequent decisional law that has advanced the common law pertaining to [11] punitive damages to the point where the term 'malice' includes not only a malicious intention to injure the specific person harmed," which is malice in fact, "but conduct evincing a conscious disregard of the probability that the actor's conduct will result in injury to others," which is malice in law, or malice implied.

The Court later goes on to say, "In Nevada, while consistently reaffirming the vitality of the Davis doctrine in our decisional law, this Court has, on occasion, also affirmed punitive awards based upon malice of a nature foreign to our own rulings on the subject."

It finally goes on to say, at least the portions that I want to read, "The species of malice known as implied malice or malice in law is distinguished from malice in fact simply by absence of the need to look to the actor's motivation and purpose."

"The common law evolves by recognition of firmly entrenched social attitudes and practices. The common law does not shape or establish public policy and mores," which is another way of saying public policy or morality, "rather, it is reflective of them. It remains consistent with public policy as expressed by NRS 42.010 to financially punish persons who deliberately injure others."

"More specifically, it is this Court's [12] intention to restrict awards of punitive damages attributable to malice in fact to those extreme cases that convincingly demonstrate conduct motivated by hatred and ill-will and the deliberate intent to injure. Difficulties arise when the judicial gaze is not transfixed on the indispensable element of malice in fact, i.e., the evil motive. A defendant's conduct may have an evil or injurious result, but no underlying evil motive to injure."

I will add parenthetically, at best, as the record currently stands as to all of the director defendants, except for Joe Shoen, the record may bear out that there was injury or an injurious result to the plaintiffs caused by those particular director defendants, but that alone under Nevada law is not enough. That's a jury question, which is a different way of saying, if there was injury caused, that's a matter of compensatory damage and not a matter of punitive damage.

"It is"—I am going back to the opinion, "It is the evil motive to injure that must be shown directly or by inference as a predicate for a punitive award based upon malice. If the judicial course remains tethered to that compass, punitive verdicts should be limited to those actions that truly warrant state-imposed sanctions. Persons who willfully intend to injure are [13] deserving of the special monetary sanction that is designed to punish and deter. Others who by their conduct cause injury are held accountable in the form of compensatory damages."

As to the last sentence I just read, that applies, at best, based upon the disputed facts as they are presented in the record as to, as to all of the director defendants, except for Joe Shoen, more specifically, Edward J. Shoen, Aubrey K. Johnson, William E. Carty, John M. Dodds and Paul F. Shoen.

Therefore the Court, incorporating the entire record and, and having highlighted some of the grounds for its ruling, it is ordered granting director defendant's motion on the plaintiff's punitive damage claims as against Edward J. Shoen, Aubrey K. Johnson, William E. Carty, John M. Dodds and Paul F. Shoen.

With respect to Joe Shoen, there is adequate evidence in the record from which a jury could find by clear and convincing evidence that the actions undertaken by him were intentional acts, were willful acts, were spiteful acts, and were designed to injure the individual plaintiffs.

I am not going to highlight all of them, but I will certainly highlight at least two—well, three from which—
[14] MR. SHAW. Your Honor, I believe you misspoke several times on the record. Just to correct, I believe you keep referring to Edward Joe Shoen as being one of the defendants you are excepting from your ruling and then say Joe Shoen as part of the, of the, of the—

THE COURT: I correct myself.

MR. SHAW: Excuse me.

THE COURT: That's confusing. I meant to say James P. Shoen is incorporated in the ruling. Joe Shoen, Edward Joe Shoen is not. Thank you.

With respect to Joe Shoen, there is in the record a history of strong feelings, negative feelings as and between his father, L.S. Shoen, as and between Samuel Shoen, at the very least.

There is also a letter that was written by Joe Shoen in which, in which the letter that I am referring to is the

letter where, where he indicates that L.S. Shoen has made his decision with respect to his heir apparent. I won't repeat some of the other things in the letter, but that letter alone may be enough from which a jury would feel that, that the actions taken by Joe Shoen fall within the category of malice in fact. It is a jury question.

There is also the correspondence witten by Joe Shoen surrounding the circumstances where his [15] children were apparently being served, and he was very upset about that.

Now, there is a dispute as to what was going on and why he made the statements that he made, and in fact—well, that's a matter for the jury to resolve, but those statements are, are part of the record, and that alone could be enough from which a jury might feel that his actions, in particular, are motivated with an intent to injure.

In addition to that, there is his conduct, both his conduct in speech and his conduct with respect to Samuel Shoen, and also his conduct in speech with respect to L.S. Shoen, that would suggest that there is enough for a jury to decide whether or not he is motivated by spite and ill will.

Those are jury questions. Those are not questions that this Court can sit here and resolve because there are too many questions this Court would have to ask and too many factual disputes that this Court would have to draw, have to decide, and too many different inferences from the facts that would, that could be drawn. For this Court to get involved in that exercise would be a way of saying that the Court does not believe that it should follow the Craigo, and that unless you can conclude as a matter of law, as a matter of law [16] that it is not a jury question, it goes to the jury.

Now, I just highlighted a few. There are more than that, and I don't intend to highlight them all. I stand

on the record, but the record is markedly different with respect to Edward Joseph Shoen, as compared to or contrasted with the remaining director defendants.

Therefore, with respect to Edward Joseph Shoen, the director defendants for, the director defendant's motion for directed verdict on, on the plaintiff's punitive damages claim is denied.

MR. SHAW: Your Honor, this gives rise to an issue that the defendants raised at the beginning of their case which we haven't really discussed, and that is the issue under Nevada law, they have a bifurcated trial.

We have done some research on it, and we believe that, that it is a procedural versus substantive issue and we should go ahead and proceed under Arizona procedural law to, to combine the entire matter versus the Nevada case, doing it after the fact.

* * * *

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

June 3, 1998

Mr. John G. Roberts
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

Re: Edward J. Shoen
v. Samuel W. Shoen, et al.
Application No. A-917

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on June 3, 1998, extended the time to and including July 15, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ Sandra Elliott Spagnolo
SANDRA ELLIOTT SPAGNOLO
Assistant Clerk

No. 98-86

Supreme Court, U.S.
FILED
AUG 18 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

EDWARD J. SHOEN,

Petitioner,

vs.

SAMUEL W. SHOEN, CECILIA M. SHOEN-HANLON, THERESA SHOEN-ROMERO, KATRINA M. SHOEN-CARLSON, MICHAEL L. SHOEN, LEONARD S. SHOEN, SAMWILL, INC., CEMAR, INC., KATTYDID, INC., THERMAR, INC., MICKL, INC. and L.S.S., INC.,

Respondents.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does imposition of punitive damages on one member of a board of directors who acted with particular malice, and who caused other directors to take actions that constituted breaches of fiduciary duty by the entire board, comply with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Does imposition of punitive damages against defendant based upon the motives underlying conduct, when proven by clear and convincing evidence, comply with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

3. Has petitioner waived his right to bring a challenge to the punitive damage award under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by failing to raise that challenge in the trial court or before the Arizona Court of Appeals?

4. If petitioner has not waived his right to bring an equal protection challenge, does the award of punitive damages imposed on him, based on tortious conduct motivated by malice and a particular motive to injure respondents, comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Edward J. ("Joe") Shoen was petitioner/cross-respondent before the Arizona Supreme Court, appellant/cross-appellee before the Arizona Court of Appeals, and defendant before the Arizona Superior Court in Maricopa County.

Respondents Samuel W. Shoen, Cecilia M. Shoen-Hanlon, Theresa Shoen-Romero, Katrina M. Shoen-Carlson, Michael L. Shoen, Leonard S. Shoen, Samwill, Inc., Cemar, Inc., Kattydid, Inc., Thermar, Inc., Mickl, Inc., and L.S.S., Inc., were respondents/cross-petitioners before the Arizona Supreme Court, appellees/cross-appellants before the Arizona Court of Appeals, and plaintiffs before the Arizona Superior Court in Maricopa County.

Each corporation named above has no parent companies, nor does any corporation named above have any ownership interest in any nonwholly owned subsidiary.

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Respondents Samuel W. Shoen, Cecilia M. Shoen-Hanlon, Theresa Shoen-Romero, Katrina M. Shoen-Carlson, Michael L. Shoen, Leonard S. Shoen, Samwill, Inc., Cemar, Inc. Kattydid, Inc., Thermar, Inc., Mickl, Inc., and L.S.S., Inc. respond in opposition to the Petition for a Writ of Certiorari submitted by Petitioner Edward J. ("Joe" Shoen), and request that the court deny certiorari.

STATEMENT OF THE CASE

Introduction. In his Petition for a Writ of Certiorari, Petitioner Edward Joseph ("Joe") Shoen repeats the same tactics he has already found unsuccessful before the Arizona courts — to rely on a 1988 opinion dealing with an appeal of a very limited four-day preliminary injunction hearing, rather than acknowledging the substantial and significant additional evidence presented during a seven-week trial some six years later. According to Joe, his liability in this case is premised on certain limited collective actions of the Board of Directors and, as a result, an award of punitive damages against him alone cannot be justified under the law of Nevada, which all parties concede applies in this case.

Joe disregards the facts that were the basis for the jury's finding that he breached his fiduciary duty to Respondents. The only issue appealed in this case was the punitive damage award. Joe Shoen's breach of fiduciary duty, and the amount of compensatory damages, thus were conclusively established in the trial court. The trial court, and the Arizona Court of Appeals, properly applied the law of Nevada to all the facts presented, including those facts discovered by the plaintiffs after the 1988 preliminary injunction application. They correctly concluded that those facts more than adequately justify an award of punitive damages against Joe Shoen. Nothing in Joe's Petition compels a contrary conclusion, or justifies a grant of review by this Court.

Facts. The facts set out by Petitioner are incomplete, at best. The events of July 24, 1988, while a substantial factor in the suit against the AMERCO Board of Directors, were not the only bases for plaintiffs' claims against the Board, or against Joe Shoen. Those events began years earlier, and continued for years thereafter, as discussed in the opinion of the Arizona Court of Appeals (Appendix A to Petition, at 2a-9a).

The events of July 24 and 25, 1988 followed a shareholders' advisory meeting at which liquidity options for family members were discussed. At that meeting, Joe Shoen physically assaulted his brother Sam, who became one of the plaintiffs who brought the suit against the Board. This assault effectively broke up the meeting. Reporter's Transcript of Proceedings, September 1, 1994, 1:30 p.m., pages 59-60 (hereinafter, *e.g.*, 9/1/94 p.m. 59-60) (cited portions of the trial transcript are included in Appendix A to this Brief).

A week later, while respondents were in New York exploring liquidity options for their AMERCO stock, Joe hastily called a Board of Directors' meeting for 9:00 p.m. on Sunday, July 24, 1988. 8/31/94 p.m. 52. Testimony from other directors made it clear they relied almost exclusively on information provided by Joe Shoen regarding the activities of the dissident family members — information that Joe characterized as fact, but for which he never revealed his "confidential" source. 9/29/94 p.m. 33-34; 10/4/94 p.m. 82-85; 9/15/94 a.m. 32-33, 37.

At trial six years later, Joe finally revealed his purported source for this "privileged" and "confidential" information. According to Joe, his information that the dissenting family members were engaged in an imminent sale of the company to a corporate raider came from a tape recording delivered to him at his office, after business hours, by a mystery woman he had never seen before or since. According to Joe, this purported

tape contained a conversation between his brother, Sam, and Sam's attorney, David Victor, discussing plans regarding AMERCO. Joe claimed he listened to the tape, allegedly played it for his brother Mark (who did not testify at trial), and then destroyed it. At trial, Joe acknowledged that, until a few days before his testimony, he had never revealed the existence of this purported tape, even to his own attorneys. He had not told the other directors the alleged source of his information, but had told them he knew for a fact that the information he had given them was true. 9/28/94 a.m. 10-23; *see also* 9/27/94 p.m. 52, 66-71.

Joe thus convinced the Board that the "dissident" family members (who became the plaintiffs in the suit against the AMERCO Board members) were bent on breaking up the company and selling it off. Paul Bilzerian, a notorious corporate takeover advisor in the 1980's, was consistently placed at the center of Joe's scenario of what was in store for AMERCO. 9/29/94 p.m. 33-34. At trial, however, Joe admitted that the only basis for this claim was his knowledge that Sam had once had lunch with Bilzerian, and that Sam and Bilzerian had graduated from Harvard Business School the same year. 10/4/94 p.m. 8-9.

Joe also withheld from Jock Patton, the Board's attorney, the fact that on June 24, just before the Sunday night Board meeting, Joe had formed a voting trust with three brothers and a sister, which would effectively control 45.8% of the company. 9/20/94 a.m. 98, 100, 105-106. He also did not tell non-family-member directors about the voting trust. 9/26/94 a.m. 95, 10/4/94 p.m. 105-106.

At approximately midnight on Sunday, July 24, 1988, the Board took the action Joe contends was the sole basis for his liability: it voted to issue AMERCO's 8,099 authorized but

unissued shares to five employees. 8/31/94 p.m. 52. These employees thereupon gave their votes to the Board, which in turn gave the votes to Joe. 9/26/94 p.m. 34-35. Unbeknownst to the Board's attorney or the non-family-member directors, those shares bootstrapped Joe and his secret voting trust into absolute control of AMERCO, with a bare majority of the voting stock. 8/31/94 p.m. 52-53. Each of the five employees was required by Nevada statute to make a down payment of $162,000. The balance of the $4.3 million purchase price required of each was "secured" by non-recourse promissory notes. 9/20/94 a.m. 77-79; 9/26/94 a.m. 91-93. Because the employees lacked the resources to pay even the down payment, Joe Shoen personally "financed" the down payments from his children's conservatorship accounts. 8/31/94 p.m. 77, 9/28/94 a.m. 44.

Although the July 1988 share issuance began the breaches of fiduciary duty that were the subject of plaintiffs' claims against the Directors, it was only the foundation of the damages awarded against the Board and Joe Shoen. Further breaches of fiduciary duty continued virtually unabated until the 1994 trial. The wrongs alleged at trial by the plaintiffs included:

- Issuing the 8,099 shares to dilute plaintiffs' then majority so as to give control to defendants (8/31/94 p.m. 51-54);

- Authorizing dilution stock to retain a future majority (9/7/94 a.m. 89-90); creating an executive stock option program, which could be used to create a new majority (10/3/94 p.m. 20-23); tolling interest on director Dodds' stock purchase note to retain a majority (9/7/94 p.m. 42-43); authorizing issuance of new special voting preferred stock, and giving power to determine the amount issued, as well as control of the votes of any

such stock issued, to Joe Shoen and his employee, Charlie Bayer (9/7/94 p.m. 13-16, 10/4/94 a.m. 32-33); allowing three family members (Joe, Mark, and Jim Shoen) to exchange common stock for Common Series A, to which can be attached special voting rights (10/3/94 p.m. 15-18); but refusing to adopt a fair price provision recommended by attorney Jock Patton (10/3/94 p.m. 62-64).

- Holding shareholders' meetings in remote locations so as to discourage attendance (9/14/94 a.m. 69-71); conducting a ten-minute shareholder meeting in a remote location, then refusing to accept plaintiffs' ballots, and instead requiring them to drive at least four hours to locate the nearest open post office before midnight (9/12/894 a.m. 48-49); changing procedures to make nominations more difficult (9/7/94 a.m. 86-87); prohibiting electronic or stenographic recording at shareholder meetings (9/7/94 a.m. 84-85, 9/13/94 p.m. 84-85); eliminating voting by written consent (9/7/94 a.m. 87-88); prohibiting write-in ballots when their opponents held a majority, but allowing write-in voting when their opponents were in a minority (9/13/94 p.m. 65-84); misleading a non-family-member shareholder aligned with the plaintiffs that a nomination had been properly made, then declaring the nomination invalid (9/13/94 p.m. 92-97); and pre-electing directors before an annual shareholder meeting (9/26/94 p.m. 39-40, 9/13/94 a.m. 59-60, 9/6/94 p.m. 27-31, 9/13/94 p.m. 65-69, 9/12/94 a.m. 48-49),

- Passing oppressive Bylaw provisions, then requiring a "super-majority to amend them (9/7/94 a.m. 89); creating a "poison pill" with a one-way "super-majority" requirement (8/31/94 p.m. 55-57); creating "golden

parachutes" with the same effect as the "poison pill" (10/3/94 p.m. 31-32); amending the bylaws to require 50% of the shareholders to call a shareholder meeting (Trial Ex. 329) and to require a two-thirds "super-majority" to approve any sale or merger not recommended by the Board (10/3/94 p.m. 22-23); staggering the terms of the AMERCO Board to delay by three years any transfer of control (9/7/94 a.m. 90-91), and creating staggered terms for the boards of AMERCO's three largest subsidiaries, thereby further delaying the time required for a new shareholder majority to obtain actual control of the AMERCO system (10/3/94 p.m. 5-15); amending the Bylaws to give the Chairman (Joe Shoen) two votes (9/7/94 p.m. 10-11); amending the Bylaws so directors could appoint their own replacements and thus bypass a shareholder election (10/3/94 p.m. 30); and reducing the annual meeting quorum requirements to compensate for the loss of two members of Joe's voting trust (9/7/94 p.m. 11-12);

- Establishing an employee stock ownership plan with non-pass-through voting (9/7/94 a.m. 56); appointing defendants and their employees as ESOP trustees (10/3/94 a.m. 38-42, 11-17); causing the ESOP to join Joe Shoen's voting trust (9/7/94 a.m. 91-93); breaching a federal court settlement by placing the dilution shares into the ESOP, and thereby removing those shares from the state court's jurisdiction (8/31/94 p.m. 83-86).

- Taking away plaintiffs' employment and their life and health insurance (8/31/94 p.m. 67-68, 9/13/94 a.m. 57-58); selectively withholding dividends from plaintiff Sam Shoen, forcing him to sue for payment (8/31/94 p.m. 4-5); invoking the corporation's right of first

refusal to bar plaintiff Michael Shoen from gifting stock (9/7/94 a.m. 93-94), but waiving that right of first refusal for members of Joe Shoen's voting trust (9/14/94 p.m. (2) 7); accelerating pre-payment of a non-delinquent mortgage owed by Michael Shoen to an AMERCO subsidiary (9/7/94 p.m. 5-6); causing AMERCO to fund Joe Shoen's personal lawsuits against the plaintiffs (9/7/94 p.m. 12); and causing the corporation to retain and compensate as consultants shareholders who joined defendants' voting trust (10/3/94 p.m. 23).

These acts stood against a backdrop of Joe Shoen's unique and malicious acts, which were not shared with the other defendants. Joe himself personally terminated his own father's employment contract, and admitted at trial his father had not breached the contract. L.S.'s health insurance was also terminated, but Joe commented that he wasn't worried about this, because he understood his father would be eligible for Medicaid. 9/28/94 a.m. 44, 47-54; 8/25/94 p.m. 100-102. At the age of 73, the founding father of AMERCO, having given all but two percent of his stock to his children, thus found himself, as a direct result of Joe's actions, without a job, without medical insurance, and with minimal financial resources. He was forced to sell his home, buy a modest tract house, and begin several new business to provide himself with income. 8/25/94 p.m. 105-106.

Joe, who had assaulted his brother Sam at the June 16 shareholder advisory meeting, assaulted his brother Mike at a subsequent annual shareholder meeting. 9/7/94 a.m. 79-82; 8/31/94 p.m. 93-96, 9/13/94 a.m. 59. Joe alone, of all the directors, testified he was angry with his brother Sam, and believed Sam was out to personally destroy him. 9/27/94 p.m. 45; 9/28/94 p.m. 51-53, 8/25/94 p.m. 29. Joe admitted that his separate personal litigation against his father and his brother

Mike was funded by AMERCO. 9/7/94 p.m. 12. In 1989, Joe told attorney Steve Case that he wanted to make life as difficult as possible "under any pretext" for Mike, L.S., Sam, and Mary Anna, in connection with stock reorganization of their holding companies, through which they owned the AMERCO stock, and which companies were also plaintiffs in the litigation. 9/14/94 p.m. (1) 42-45. Joe's sister Katrina testified about how Joe coddled her over a period of time, frightened her with stories that "Sam wanted to sell the company . . . out from under us," and provided her such goodies as a free Corvette. 9/1/94 p.m. 31-32, 54.

Katrina told the jury about a shareholder meeting Joe enticed her and Theresa to attend, under the guise that their opinions were valuable and needed. As it turned out, Joe only wanted them there to make up a quorum so the shareholders could approve an ESOP. She testified that, after the meeting, Joe celebrated like someone "who just won a major league baseball championship," and she felt she had been used. At that point, Katrina began to have serious doubts that Joe's actions in running the company were objective. 9/1/94 p.m. 42-47.

Theresa testified about the same event, in essentially the same manner, stating the meeting was called to order as soon as she walked in. She felt she had been "railroaded" to enable Joe and his cronies to pass an ESOP that had been turned down by the majority of the shareholders less than six months before. 9/13/94 a.m. 45-48. Only months before the 1994 trial began, Joe offered Theresa an opportunity to join his voting trust in exchange for liquidity for her stock, but told her he would never allow L.S., Mike, or Sam to achieve any liquidity for their stock. 10/5/94 a.m. 88-90.

During his trial testimony, Joe Shoen testified about the value of AMERCO stock (9/28/94 p.m.(1) 6). A trial exhibit

revealed to the jury the number of shares he owned; a simple mathematical calculation would have set the value of his AMERCO stock, based on his own testimony and on evidence presented to the court, at more than $70 million. 9/28/94 p.m. (1) 6-7; Trial Ex. 534. Joe also told the jury that his salary for fiscal year 1994 had been $207,798, and that he had received a bonus of $2,101,490. 9/29/94 a.m. 38-40.

On October 6, 1994, at the end of a seven-week trial, Judge Thomas Dunevant III instructed the jury regarding the claims they would need to decide. 10/6/94 a.m. 4-20. The court instructed the jury that plaintiffs were asserting claims against all the defendants for tortious breach of fiduciary duty (10/6/94 a.m. 10-11), and that plaintiffs also claimed punitive damages should be assessed against Joe Shoen in connection with the breach of fiduciary duty claim (10/6/94 a.m. 17). The jury was clearly instructed on the standard to apply to determine these claims:

> Some of the claims in this case require proof by clear and convincing evidence.
>
> A party who has the burden of proof by clear and convincing evidence must persuade you by the evidence that the claim is highly probable. This standard is more exacting than the standard of more probably true than not true, but it is less exacting than the standard of proof beyond a reasonable doubt.
>
> * * *
>
> If you find the director defendant Edward J. Shoen liable to plaintiffs for plaintiffs' breach of fiduciary duty claim, you may consider whether

> additional damages called exemplary or punitive damages should be awarded to plaintiffs and assessed against defendant Edward J. Shoen. The purpose of punitive damages is to punish the wrongdoer and to deter similar conduct by others. However, such damages cannot be awarded on the basis of plaintiffs' breach of contract claim.
>
> To recover such damages, plaintiffs have the burden of proving by clear and convincing evidence that Edward J. Shoen has been guilty of oppression, fraud, or malice, express or implied. In order to prove oppression, fraud, or malice, express or implied, plaintiffs must prove conduct, which forms the basis of plaintiffs' breach of fiduciary duty claim, motivated by hatred and ill-will and the deliberate and evil intent to injure plaintiffs.
>
> To prove such guilt by clear and convincing evidence, plaintiffs must persuade you that the punitive damages claim is highly probable. This burden of proof is more exacting than the standard of more probably true than not true, which applies to all other claims in this case, but is less exacting than the standard of proof beyond a reasonable doubt.

10/6/94 a.m. 9-10, 17-18.

The jury deliberated, and concluded that the Board had breached a fiduciary duty to the plaintiffs, and awarded nearly $1.5 billion in damages. The jury also concluded that defendant Edward J. Shoen had been guilty of

> oppression, fraud or malice through conduct, which forms the basis of a breach of fiduciary duty owed

> to the plaintiffs, motivated by hatred and ill-will and the deliberate and evil intent to injure plaintiffs,

and imposed $70 million in punitive damages against Joe Shoen. 10/7/94 p.m. 3-4.

Post-trial motions ensued, including Joe Shoen's Motion for Judgment Notwithstanding the Verdict or, Alternatively, for Remittitur of Punitive Damages (Appendix B.) Judge Dunevant reduced those sums following post-trial motions, to $461 million and $7 million, respectively. Joe Shoen then appealed only the grant of punitive damages (*see* Appellant's Opening Brief, Appendix C). In his post-trial motions and his brief in the Arizona Court of Appeals, Joe challenged the punitive damage award as violative of due process, but did not raise an equal protection issue.

REASONS FOR DENYING THE WRIT

I.

THE DECISIONS OF THE ARIZONA COURTS, AND THEIR APPLICATION OF NEVADA LAW, ARE COMPLETELY CONSISTENT WITH THIS COURT'S RULINGS ON PUNITIVE DAMAGES, AND DO NOT REQUIRE REVIEW.

Review on certiorari "is not a matter of right, but of judicial discretion." Rule 10, Rules of the Supreme Court of the United States. Such review of a state court decision is granted in two limited circumstances:

> (b) When a state court of last resort has decided an important federal question in a way the conflicts with the decision of another state court of last

> resort or of a United States court of appeals. [or]
>
> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

Id. In this case, review is not appropriate. The conduct of Joe Shoen was *not* "indistinguishable from that of every other member of the board," as alleged in the Petition. Instead, Joe Shoen's conduct clearly demonstrated the malice underlying his calculated orchestration of the actions that literally destroyed the value of the plaintiffs' stock in AMERCO. The decision of the Arizona Court of Appeals correctly applied the applicable law to the facts of this case, and this Court need not review that decision.

A. The Law Applied by the Trial Court Provided Adequate Protection for the Due Process Right of Joe Shoen.

Petitioner first argues that the punitive damage award against him violates due process. That assertion cannot be supported.

Repeated constitutional challenges to punitive damage awards imposed by state courts have been raised before the United States Supreme Court, particularly since 1988. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (challenging constitutionality of punitive damage award pursuant to Eighth Amendment prohibition against excessive fines); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (challenging constitutionality of punitive damage award as violative of the Due Process Clause of the Fourteenth

Amendment); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (challenging constitutionality of punitive damage award as violative of substantive due process).

The rule developed in these cases has been that punitive damage awards survive constitutional challenges based on due process if state law provides certain procedural safeguards, and do not if those safeguards are not present. *See, e.g., Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (reversing award of punitive damages because Oregon law does not provide for judicial review for excessiveness).

1. *The award in this case is not constitutionally infirm as a deprivation of due process.*

Haslip sets out in detail the kinds of procedures necessary to protect against abuses of punitive damages that might lead to constitutional violations. *Haslip*, 499 U.S. at 19-23. These include: (1) instructions that enable the jury to determine the nature and purpose of punitive damages and to enable them reasonably to determine whether to impose such damages and in what amount, *id.* at 19-20; (2) post-trial procedures at the trial court level for scrutinizing punitive damage awards, *id.* at 20; (3) appellate review of punitive damage awards, *id.* at 20-21.

All the procedural protections approved by the Supreme Court not only are present in this case, but also have been utilized by Joe Shoen. All parties agreed that Nevada law applied in this case, and punitive damages under Nevada law are strictly limited by statute:

> Except as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by ***clear and***

> ***convincing evidence*** that the defendant has been guilty of ***oppression, fraud or malice, express or implied***, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:
>
> (a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or
>
> (b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.

Nev. Rev. Stat. § 42.005(1) (emphasis added).[1] The jury was

1. The states of mind supporting punitive damages were codified by the Nevada Legislature in 1995:

> 1. "Conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.
>
> 2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.
>
> 3. "Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

(Cont'd)

fully instructed on that standard for imposing punitive damages — a standard that required the jury to find that it was "highly probable" that Joe's conduct justified imposition of such damages.

Joe filed a post-verdict motion seeking relief from the award; indeed, Joe himself admits that the jury's original award was reduced from $70 million to $7 million as a result of the post-trial procedures in this case. Finally, Joe Shoen already has had full access to Arizona's appellate courts. This Court need not provide further review.

2. *Nothing in Nevada law prohibits holding one joint tortfeasor liable for punitive damages even when others are not similarly liable, when such liability is justified by the facts of a particular case.*

Not all jurisdictions agree on whether punitive damages may be imposed on a single defendant and not on others if the defendants are jointly and severally liable for the underlying wrong. *See generally* Annot., *Apportionment of Punitive or Exemplary Damages as Between Joint Tortfeasors*, 20 A.L.R.3d 666 (1968). That annotation recognized the majority rule, with which Nevada courts agree, that

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(Cont'd)

4. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

Nev. Rev. Stat. § 42.001. Although these definitions were not included in the Nevada statutes at the time this case was decided, they were adopted from Nevada case law that was controlling at the time this case was tried. *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1055-56 (9th Cir. 1997), *citing Granite Constr. Co. v. Rhyne*, 817 P.2d 711 (Nev. 1991).

> [I]n an action against joint tortfeasors punitive or exemplary damages may be awarded in different amounts against the several defendants or they may be awarded against one or more of the defendants and not others, depending upon the differing degree of culpability or the existence or nonexistence of actual malice on the part of the defendants.

Id. at 668-69. That annotation cites, among other cases, *Hotel Riviera, Inc. v. Short*, 396 P.2d 855 (Nev. 1964), a case defendant vainly attempted to distinguish from this one in the Arizona courts. The court in that case did hold defendants had waived their right to assert error in a form of verdict that permitted the jury to assess punitive damages against two defendants but not against a third. *Hotel Riviera*, 396 P.2d at 863. It did not stop there, however, but made its position on this issue quite clear:

> The proper rule, . . . appears to be:
>
> * * * that the jury, in an action against joint tortfeasors, may make awards for exemplary damages in different amounts, depending upon what the evidence shows and the jury finds to be the differing degree of culpability among the several defendants, seems to be in accord with the majority of cases which have passed on this point.
>
> In Thomson v. Catalina, 205 Cal. 402, 405, 271 P. 198, 200, 62 A.L.R. 235, the court said: " * * * juries should be allowed so to admeasure and apportion such exemplary damages as to make the example as well as the punishment fit the offense." Other authorities are cited by the parties on this point but we forego further discussion of it. We find no merit in the error assigned.

Id. (citations omitted in part).

Nothing in the Petition gives rise even to an inference that the Nevada Supreme Court has changed its mind since it decided *Hotel Riviera*. Nevada stands with the majority of jurisdictions that allow a jury to impose punitive damages against one joint tortfeasor and not against others when the facts of a given case justify such a result. The facts in this case ***did*** justify such a result. Despite Joe's attempts to justify his actions, despite his argument that "everybody else was doing it," the Arizona Court of Appeals saw the truth — everybody else ***wasn't*** doing it!

Joe Shoen's conduct stands in sharp contrast to the conduct of the other defendants. Joe's independent and unique conduct more than justifies an award of punitive damages against Joe alone. Joe participated with the other defendants in nearly 50 acts of entrenchment and breaches of fiduciary duty, but only Joe committed distinct and unique acts of deceit, vengeance, and outright physical violence. Joe was one of only three family-member directors, but only Joe was both the Chairman of the Board and the President of AMERCO. Joe was the only family member who became an ESOP trustee. Only Joe had the proxies of the "key employees." Only Joe had the voting rights to the preferred stock. Only Joe attempted subtle bribery of his sister Katrina in an attempt to lure her swing vote into his voting trust. Only Joe stated he wanted to make the lives of his family members as difficult as possible. Only Joe eavesdropped on privileged communication between his brother Sam and Sam's attorney, destroyed a tape of that communication, and then not only failed to disclose that tape as the basis for his "fears" of what his siblings were doing in July of 1988, but also somehow neglected to disclose the purported tape to his own attorneys until shortly before his testimony during the 1994 trial. Only Joe personally terminated the employment contract of the company's founder, his own father, on the feeblest of pretexts. Only Joe cut off the health insurance of his epileptic sister. Only Joe turned shareholder meetings into shareholder beatings.

The picture is clear: Joe Shoen alone acted with the kind of malice that deserves punishment by way of punitive damages. The Arizona Court of Appeals correctly affirmed the trial court's award of punitive damages against Joe Shoen alone, and this Court need not review that holding.

3. *The evidence before the trial court established a causal nexus between Joe's malicious conduct and the harm suffered by the respondents.*

Joe Shoen also raises a substantive due process argument, contending the evidence did not show that his malicious actions caused the harm suffered by respondents. That contention also fails when the evidence is carefully examined.

At the end of the trial, the jury was instructed to "consider the character of [Joe] Shoen's conduct or motive ***and the extent of harm*** to plaintiffs that ***Edward J. Shoen caused*** . . . ." 10/6/94 a.m. 18, 160a. (Emphasis added). By that time, the jury had heard how Joe almost single-handedly orchestrated the issuance of the dilution shares, by feeding half-truths and outright misinformation to other members of the Board, and by holding back from other board members and the board's attorneys information about a secret voting trust. They had heard testimony about a shareholders' meeting to which Joe lured his sisters solely to make up a quorum so Joe could pass an Employee Stock Ownership Plan into which the board, at Joe's direction, promptly placed the dilution stock, in direct violation of a federal court settlement agreement. The testimony presented went on and on, and plainly established that Joe was not in the same position as any other director. In fact, he was in a unique position, as Chairman of the Board, President of the company, and the head of a shareholders' voting trust. And not only was he in a unique position, he had unique motivations in seeking to injure the respondents.

The members of the jury examined Joe's actions, and the motivation behind them; they had the opportunity to see all of the witnesses and to evaluate their testimony, their body language, and their demeanor. At the end of the trial, the court properly instructed the jury that, before imposing punitive damages against Joe, they must find that his conduct was a ***cause*** of the harm suffered by the respondents. Sufficient evidence was presented from which the jury could have, and did, find that Joe's conduct was a unique factor in causing respondents' harm. That conclusion, and the imposition of punitive damages against Joe Shoen, did not deprive him of due process.

B. Joe Shoen Did Not Adequately Raise an Equal Protection Argument Below, and Is Barred from First Raising Such an Argument Here.

This Court will not review a challenge to punitive damages that was not raised at the trial court level. *E.g., Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76 (1988). Joe Shoen's post-trial motion and his opening brief in the Arizona Court of Appeals challenged the award of punitive damages against him on due process grounds. Appendices B and C. Joe did not, however, challenge the award on equal protection grounds in those courts. *Id.*

As a result, this Court must reject Joe Shoen's challenge to the punitive damage award as a deprivation of equal protection.

C. Even If the Equal Protection Challenge Had Been Timely Raised, the Award in this Case Did Not Deprive Joe Shoen of the Equal Protection of the Laws Applied.

The Court thus far has come close to an equal protection analysis in only one case. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (holding that lawful conduct of auto

manufacturer outside Alabama could not be considered by an Alabama court in determining appropriate level of punitive damages to be imposed). Nevertheless, Joe Shoen contends, without any real support in existing case law, that imposition of punitive damages on one director when the entire Board was sued violates equal protection principles as arbitrary and irrational discrimination. That argument also must fail.

The injury to the stock of the dissenting shareholders was not a result of a single act, but of a succession of acts, and Joe was the driving force behind those acts. His argument that his malice did not cause respondents' injuries is disingenuous at best. Joe Shoen was not singled out in this case in an arbitrary or irrational manner. His conduct, like the conduct of every other defendant, was closely examined. The jury had the opportunity to observe Joe's demeanor as he testified, to view his body language and listen to his tone and inflection, and to determine whether Joe had a personal vendetta against the family members who opposed him.

Substantial evidence was presented to the court and the jury that distinguished Joe's conduct, and Joe's motives underlying that conduct, from that of any other Board member. Joe Shoen alone took actions with the motive to injure the plaintiffs and to destroy the value of their stock, to keep them "under his thumb" while denying them any opportunity to escape. Only Joe, as the motivating factor behind the secret voting trust, had access to information that made it plain that Board actions designed to create a "level playing field" would instead have the effect of permanently entrenching Joe and his secret voting trust cronies in power and destroying the value of the stock of his siblings and his father.

There is nothing arbitrary or irrational about imposing punitive damages on one whose behavior so merits punishment.

Indeed, it would be arbitrary and irrational to refuse to do so! Joe Shoen's constitutional challenge to the punitive damage award must fail, as it has already, and this Court need not further review that conclusion.

CONCLUSION

Petitioner has presented this Court with no reason to accept review of the punitive damages assessed against him in this case. This Court need not grant review in this case for any alleged constitutional infirmity in the imposition of punitive damages, because no such infirmity exists. The process for imposing punitive damages against Joe Shoen complied with every procedural safeguard discussed by the United States Supreme Court in applicable cases, and the award thus was not imposed in violation of Joe Shoen's due process rights. Nothing in Nevada law prevents assessing punitive damages against one joint tortfeasor and refusing to assess them against another, so long as the culpability of the tortfeasor against whom such damages are assessed justifies the award. That rule is followed in most jurisdictions. The award of punitive damages against Joe Shoen likewise is not constitutionally defective based on lack of causation; the jury heard substantial evidence that enabled them to conclude that Joe Shoen's conduct did cause the harm suffered by respondents, and that his motive in causing that harm was so malicious as to subject him to puntive damages. In this case, Joe Shoen's culpability differed in both degree and motivation from the culpability of his fellow directors, and punitive damages were properly imposed.

Joe Shoen did not properly preserve an equal protection challenge to the punitive damage award, since he did not raise that challenge before either the trial court or the Arizona Court of Appeals. This Court therefore should decline review of this case on equal protection grounds. In any case, the punitive

damage award was not imposed in an arbitrary and irrational fashion, but was directly related to Joe's particular culpability; the award thus does not violate any principles of equal protection.

For all of the foregoing reasons, Respondents request the Court to deny the Petition for Certiorari in this matter.

Respectfully submitted,

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APPENDIX A

APPENDIX A — TRANSCRIPT OF PROCEEDINGS

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. CV 88-20139

LEONARD S. SHOEN, et al.,

Plaintiffs,

vs.

EDWARD J. SHOEN AND PAUL J. SHOEN, et al.,

Defendants.

BEFORE THE HONORABLE THOMAS DUNEVANT, III

Phoenix, Arizona

REPORTER'S TRANSCRIPT OF PROCEEDINGS

August 25, 1994, 1:30 p.m.

[29] * * *

Q What did Joe say to you?

A [PLAINTIFF L. S. SHOEN] My first conversation with Joe was that he was very aggressive, angry, and specifically angry with Sam.

Q Did Joe — stop you for a second.

Did Joe convey his intentions about the Board of Directors to you?

A Yes.

Q Okay.

A He told me that he had enough votes and that they were going to, to go up and elect a board.

Q Did he — excuse me, L.S.

A He didn't tell me he was going to take — specifically knock me off the board. He told me Sam would not be on the board.

[100] * * *

Q BY MR. SHAW: Mr. Shoen, now prior to the shareholders' meeting in March of 1989, beginning of 1989, you were still being compensated under your consulting agreement?

A Yes, until early in 1989.

Q Okay. I am going to hand you what's been marked as Exhibit 211 first and ask if you could justify that by date and who authored that particular letter to you.

A This is dated February 20, 1989, and its often — and it's written to me by my son Edward Joe as president and chairman of the board of Amerco.

Q Okay. Does that letter indicate to you that you had been compensated under a particular clause of your contract?

A Yes.

Q What particular clause was that?

A Disability clause.

Q Had you ever informed Joe that you were, in fact, disabled?

A No.

[101] Q Has he ever communicated to you the fact that you were disabled, I mean, pursuant to your, pursuant to your retirement, or consulting agreement?

A No.

Q Okay. Does that letter, in fact, terminate your consulting agreement with Amerco?

A With a condition, yes.

Q And the condition is what?

A The condition that I testified under oath that I was not manic depressive. I had testified at an IRS trial that Joe was involved in.

Q And you then subsequently, or Joe wrote to you specifically about —

A I told, I testified that I —

Q No, no, I am not concerned about what you testified about, Mr. Shoen. He indicated that you testified under oath about a particular disorder?

A Yes.

Q Okay. You did not suffer from a particular disorder?

A He said I said under oath that I did not suffer from this disorder.

Q And, in fact, you then — he offered you a condition, right?

[102] A Yes.

Q What was that condition?

A If your testimony is controverted by a physician —

Q Well, just, just —

A If I'd get a psychiatrist to certify that I was disabled and I had this specific mental abnormality, which I wasn't basically responsible for my actions, but he would — that they would reconsider continuing my compensation under the disability clause.

Appendix A

[105] * * *

Q I think you mentioned earlier in your testimony that you had, that you had some income at this time [the time of his termination] from fleet ownerships?

A Yes.

Q Okay. But outside of the fleet ownership program or income stream, was this your only other source of compensation?

A That was the only thing I had as compensation. I still had some money in the profit-sharing trust.

Q And, in fact, by this time you had actually received a dividend, hadn't you, in, in the spring of 1989?

[106] A I probably had, I can't recall now — yes, yes, I think it was the fall of 1987 that the first dividend —

Q But you had no other regular source of income?

A No, no, no.

August 31, 1994, 1:30 p.m.

[4] * * *

Q All right. Sam, in early 1988 was, was a dividend declared?

A [PLAINTIFF SAMUEL W. SHOEN] It was issued in early '88 I believe, yes.

Q And were you entitled to such a dividend?

A All shareholders were, and I was, also.

Q Did you receive — do you recall receiving a dividend, personally?

A No, sir, it was withheld by the company.

Q What do you mean withheld by the company?

A They issued that dividend to every shareholder but to me.

Q Was there a reason provided to you why your dividend was withheld?

[5] A No.

Q Did you eventually receive your dividend?

A I had to go to court to get it.

[51] * * *

Q BY MR. BISBEE: With your 51 percent of share, or pardon me, 51 percent majority ownership in the company that you believed you had on July 25th after the issuance of those 8,099 shares, how much ownership did your group represent in the company?

A Roughly, the plaintiffs group represented roughly 47 and some odd percent.

Q Was that less than the new numbers from the issuance of the 8,099 shares?

A I am sorry, I don't understand that question.

Q Well, did you have less ownership position now than, than the defendant's group?

A Yes, they had the 8,099 shares.

* * *

[52] * * *

Q What do you know now occurred on, on July 24th and subsequent that affected your shareholders' rights in Amerco?

A The first thing they did was take all the shares of stock that the company owned, that they had repurchased over the years and some shares of stock that they owned that they had actually never sold, and they sold those shares to five so-called key employees.

Q Do you know who those five key employees were?

A Yes. They were Gary Horton, who is the treasurer, Gary Klinefelter, who was the general counsel, John Dodds, who was an executive vice president, and a director, Hank Martin, who was president of the insurance companies, and a man by the name of Harry DeShong, who was in charge of the marketing department.

Q Okay.

A Is that five, or did I miss somebody?

Q I believe that was five.

A Okay.

Q Do you understand now what the effect of [53] issuing those shares to those five individuals had upon your stock?

A Yes, I do.

Q What was that?

A They diluted us from a majority to a minority and set it up so that they controlled the votes of those shares so that — they stuffed the ballot box, is what they did.

Q Well, your group representing 40 some percent, 48, 49 percent of the stock, I believe, was in New York. Was anyone in that group represented here by the plaintiffs? Was anyone in that group notified of the July 24th meeting?

A No, we were not.

* * *

[54] * * *

Q What was the total amount or total number of authorized shares in 1988 on July 24th to, that could have been issued or were authorized, pardon me, by Amerco?

A The number, the total number that were authorized by the company were 100,000.

Q Did this board subsequently attempt to increase that authorization?

A Yes, they did.

[55] Q Do you know how much they tried to increase it by?

A They added 7,500 more shares of authorized but, but unissued stock that they could keep in the treasury. They reloaded the gun, is what they did.

Q Did they amend the articles of incorporation to affect the number of shareholders required to call special meetings?

* * *

Q BY MR. BISBEE: What other actions are you aware of or have become aware of, Sam, that affected your interest in the corporation?

A Well, I will try to go through them in basically the sequence that they occurred, but I am sure I will get some of them out of sequence.

[56] First thing they did was they sold this stock for — to these so-called five key employees. They then took back from those five key employees the right to vote that stock. The chairman of the board, Joe Shoen, took that back, so that while the stock was sold to these employees, the employees didn't get to vote it.

Once they had the votes, they then authorized the 7,500 additional shares. They restocked the treasury. They authorized the issuance of, I believe, 100,000 shares of preferred stock.

They later, within a few days, I believe, authorized that stock, that preferred stock to be made voting.

They then authorized the creation of what's called a poison pill. The poison — should I explain that?

Q Well, let me ask you a question about that. What do you understand the meaning of "poison pill" to be?

A The way this poison pill works is if any combination of existing shareholders gets together, that comprises over 50 percent of the stock in the company. The directors have the right to give stock to those shareholders who are not a member of that 51 percent group at half the price.

[57] Q And this is done for what purpose?

A This is done for the same purpose as the original issuance of the 8,099 shares. This is done so that were any group of existing shareholders to get together that could potentially throw these people off the Board of Directors, they could then issue additional shares of stock at a heavily discounted price to themselves and their shareholder allies to once again dilute this majority back out.

Q Do you recall any other changes to the articles of incorporation or the corporate bylaws that affected your position within the company as a stock owner?

A Yes, I do.

Q And what would that be?

A They passed what is called a 66 and two-thirds super majority requirement. In other words, once they had amended the bylaws to their satisfaction in the articles, they passed a requirement that would take 66 and two-thirds percent of the shareholders to change them back the way they were.

In other words, they used the existing bylaws and the 50 percent majority that they required to entrench themselves with these devices. Once they had successfully entrenched themselves, they destroyed the [58] weapon they used to entrench themselves.

Q What was your understanding of the rationale for entering into these, the Board of Directors entering these actions?

A Do you mean their stated reason or, or why they really did it?

Q Your opinion.

A The reason they did it was to entrench themselves in power, to freeze us out of the company, and to, and to perpetuate in these deals, to perpetuate themselves on the Board of Directors, and to perpetuate their power, and in the case of myself and my father, to attempt to punish us for something that they didn't like we did.

Appendix A

[67] * * *

Q Did you have health and life insurance through the company, even though you were no longer an active manager?

A Yes, I did.

Q Did you maintain that health and life insurance, or did the company maintain it for you, even though you were no longer on the board as of July of '88?

A As of — yes, as of July of '88, I had [68] health insurance with the company.

Q Was that health and life insurance at some time discontinued?

A Yes.

Q When was it discontinued?

A The health insurance was discontinued the day after we filed our written consent with the company, which I think was the 29th of July, 1988.

Q And the life insurance?

A The life insurance was discontinued sometime later. I don't recall when that was discontinued.

Q Was any reason given to you for the discontinuing the health and life insurance that you had been provided through Amerco?

A No, sir.

[77] * * *

Q The money from, that went from Joe Shoen's conservatorship accounts to pay for those, or loan, pardon me, loan to the five key employees stock, five key employees for their 8,099 shares on July 24th, that was from a conservatorship account?

A Yes, sir, it was from two conservatorships from my brother Joe's two children.

[83] * * *

Q In order to resolve that issue, there was a settlement entered into in the Federal District Court, is that correct?

A Yes, sir.

Q Do you recall the, the essence of that settlement agreement, what it was intended to do?

A Yes, I do.

Q Could you briefly describe it?

A The agreement was that none of the 8,099 shares that had been issued to these five key employees would be transferred into the employee stock ownership plan.

Q For the reasons you have previously [84] described, that was still a concern of yours, even at that time?

A It was even more of a concern at that time.

Q Do you remember the approximate date of the settlement agreement?

A It was sometime in the mid to late fall of 1988.

Q And this current action was filed when?

A This lawsuit was filed in, on, I believe, August 3rd, 1988.

Q Now, the intention, what was — strike that.

That Federal settlement agreement, did you feel it provided you with a degree of protection?

A Yes, I felt — yes, I felt it provided us pretty darn good protection.

Q Protection insofar as the 8,099 shares?

A Yes. Do you want me to explain it or no?

Q If you can keep it brief, sure.

A We knew that none of these so-called key employees could pay the interest payments on the stock. We knew that it would force the company to repossess the stock. We knew that when the stock went back into the company's treasury, they couldn't vote it. We knew if they couldn't vote that stock, we would have our majority back.

[85] Q So you felt that this was an opportunity to get out of some of the mess that you had seen?

A Yes. As soon as the first interest payment came up for these key employees, we would be out of the woods.

Q Well, if this stock was put into an ESOP, why was that a concern to you?

A Well, I can speak for myself.

Q Exactly.

A One of the, one of the departments that reported to me when I was president of U-Haul International was the human resource personnel department, and I knew from our 401-K plan and from our profit-sharing plan that, that the Federal government regulations on plans which are intended to provide employees with benefits, such as profit-sharing, are pretty darn strict, and that I believed, and I actually tried to understand the law in the law library, but I believed that if that stock ever got into the ESOP, it would be impossible to get out of it because it would be there for the benefit of employees. The government protects those kinds of things.

Q So you felt that with the Federal settlement agreement, that you could avoid that problem, perhaps get some of that voting power back to your stock, if you [86] will?

A Yes, very definitely.

Q Did, in fact, some of those 8,099 shares get put into the ESOP?

A Yes, sir, they did.

Q Did, in fact, that violate the Federal settlement agreement?

A Yes, it did.

Q And that has been deemed a fact, has it not, by this Court?

A Yes.

[93] * * *

Q Well, can we characterize the general tenor of the meeting as shareholders' business then?

A Well, not really, no.

Q Well, why wouldn't you characterize it in that fashion?

A Well, the way it started out was my brother Mike and I had both brought with us little pocket tape recorders, and the, my brother, Joe, announced at the beginning of the meeting that everybody would have to give up their tape recorders, so I gave mine up. One of the guards came and collected it.

My brother, Mike, said that he wasn't going to give his up. He had a right to tape record the meeting if he liked, and after some pretty nasty discussion, he was allowed to keep his tape recorder.

I requested mine back, but they wouldn't give it to me.

Q And then did the meeting progress in, in the shareholders' meeting fashion?

A Well, it wasn't like any shareholders' meeting should be, what people normally think of.

Q Well, what made it different?

A Well, it was extremely hostile, extremely [94] tense. A shareholder by the name of Bert Miller, who I hadn't seen in years, showed up, and he spoke of his concerns about this issuance of the 8,099 shares.

He was on the receiving end of a barrage of obscenities from my brother Mark.

Q As the meeting progressed, did something memorable occur to you?

A Yes, as the meeting broke up, it did.

Q What happened?

A Well, we had elected the directors, or I should say they had elected themselves again.

I was, I was about to pick up my briefcase off this chair, and my brother, Mark, started shouting at my brother, Mike, that his father was a Jew killer, or his father-in-law was a Jew killer.

Mike held up his tape recorder and he says, go ahead, Mark, keep talking, I can't quite hear you, or something like that.

The next thing that I noticed was Mark was to my right at that point and Mike was to my left, and Mark came lunging across in front of me throwing a punch, which I initially thought was aimed at me, but it was actually aimed at Mike.

The next thing I noticed was that Mike was, was standing about five or eight feet away from me. His [95] arms were pinned to his side from behind by my brother, Joe, and my brother, Mark, was pounding him with his fists.

Q What did you do when you saw that?

A Well, I looked at the guards, and they are just standing there watching all of this, and no one was doing anything, so I went over and I grabbed Joe from behind and pulled him off Mike.

Q Did that seem to stop the scuffle?

A Well, I thought it had, and I went back to to get my briefcase. On the way back to get my briefcase, my brother Mark hit me with a punch.

Q Did you respond?

A Well, actually it was such a melee, I didn't really notice it, but he started yelling at me how he had sucker punched me, and at that point, at that point one of the guards came over and grabbed Mark and was about to escort him out of the shareholders' meeting.

Q The guard was about to escort Mark?

Appendix A

A Mark out of the shareholders' meeting because he was creating quite a ruckus.

Q All right. And what happened?

A Mark shouted at the guard, not me, you blank, I have got a green sticker, get him, and pointed at me.

[96] Q Well, did the guard come after you?

A Yeah, two guards came and got me and hauled me out.

Q Did that effectively end that year's shareholders' meeting?

A Yes.

September 1, 1994, 1:30 p.m.

[31] * * *

Q Okay. Did he talk with you at all about, or did you have any conversations with him about the overall management philosophy that Joe was wishing to use?

[32] A [PLAINTIFF KATRINA (SHOEN) CARLSON] Joe said that this company has been run too emotionally over the past years with the family and that he was very unemotional in terms of, that he is a very professional businessman in terms of being involved with this company, that he did not take into any consideration, except for the fact that he wanted this company to be run well and profitably.

Q And at the time, prior to the 1987, May 1987 shareholders' meeting, had you made up your mind at all about how you were going to vote on any —

A No.

Q — directors or anything like that?

A No, I was very conflicted.

Q Did you talk with Joe about any — about Mike and Sam and L.S. being on the board?

A Yes.

Q Do you recall what the nature of those discussions were, what you talked about?

A Joe said absolutely L.S. and Sam should not be on the board. He did not say anything about Mike, that I recall, but that they weren't — all I can say is that.

[42] * * *

Q BY MR. SHAW: When you walked in at this meeting and you decided to stay, Katrina, what began to happen? Can you describe briefly what you observed, what you heard?

A It was very rushed. We were barely sitting down before it was called to order. We just came in, and it was very fast.

Q Do you recall the first thing that was discussed or was on the agenda for discussion?

A Well, there was a discussion about special shareholders' meetings. This was a special shareholders' meeting, and I understood that certain shareholders present did not want such a small percentage to be able to call their own meetings, so they wanted to increase the percentage to, I don't know, 35, 40 percent, or something. I don't really recall exactly.

Q What was ultimately passed, do you recall?

A A 20 percent, it was increased to 20 percent, 20 percent of stock to call a shareholders' meeting, special shareholders' meeting.

Q Do you recall the next thing that was discussed?

[43] A Yes. It wasn't — there was really, to even classify this as normal discussion, is stretching it. It was very quick. It was a discussion about an ESOP.

Q Had you been aware of previous discussions about an ESOP prior to this meeting in 1988 amongst the shareholders?

A Yes.

Q Could you describe what you were aware of as you sat there at that meeting that morning?

A I was aware that there was lots of ways to, to give employees benefits. This was a way that we had voted against in September. I was aware that there was a concern, and I did not understand the complete concern, but there was concern in my family about using it as a device to entrench management, to dilute other ownership of shares, and I understood that that

was not a possibility that I felt was necessary to risk, and so when it came up again, I was very surprised.

Q If I can stop for you a second.

A I'm sorry.

Q In September of 1987 it was discussed at a shareholders' meeting, is that what you are testifying to?

A Oh, I, I — yes.

Q And when it came up on the agenda here, were [44] you surprised that it was even being brought up for discussion?

A Absolutely.

Q Why were you surprised?

A It was voted down at the '87 meeting. I voted against it, as well.

Q And was a vote taken on the ESOP?

A Yes.

Q And did you vote for it at that time?

A I voted against it.

Q Do you recall what your sister Teresa did with her vote?

A She voted against it.

Q Did it pass, though, with the people that were there?

A Yes, it did.

Q So there was a discussion about the special shareholders' meeting, the number of people, number of people to call a special shareholders' meeting, discussion of the ESOP. In your review of the minutes, is there anything else that you recall that was discussed?

A Yes. I know that I was elected to the Board of Directors at that meeting.

Q Okay. Did you — what happened when you [45] were elected? What did you do?

A I voted against it. I did not want to be on the Board of Directors. I believe I voted against it. Of course, you know, I don't —

Q Why didn't you want to be on the board?

A It was my senior year. I was writing a senior honor's thesis. It was a paper that was going to be over, you know, it was hundreds and hundreds of pages, and I had been working on it for the first semester and was going to have to complete it by the end, by May, which I was graduating that year, so it was, I believe, very clear to them that I did not have the time.

Q Okay. You didn't have the time. Did you have any other concerns, other than just time?

A I was very concerned then. It was not a pleasant environment.

Q At that particular meeting you are talking about?

A Yes, because I felt that I was being railroaded.

Q What gave you that impression?

A The way that things were going so fast, and with, without any regard to discussion, very little regard to discussion.

Q Is there anything else that was discussed at [46] that meeting that you can recall today?

A Not that I can recall.

Q About how long was the meeting?

A 10 to 15 minutes.

Q After the meeting adjourned, could you tell the jury what you observed or what you saw?

A It was like, like kids who just won a major league baseball championship. I felt like there was such this feeling that they just won something. I basically voted against everything that was there, and it was, it was like now leave, kind of feeling, like I was used. I felt very used, right then and there. I mean, it was clear, and I didn't quite know what had happened, in terms of how, but I knew that they did not — whatever. I was not wanted any more, and the meeting was over.

Q Did it end rather abruptly?

A Yes.

Q After this meeting, did you become — did you begin to have any more concerns about Amerco and what was happening at the company?

A I was very concerned at this point.

Q What were you becoming concerned about, Katrina?

A Well, I had specific concerns about how I was informed about what Joe was informing, how he was — [47] the things that I based my decisions on before seemed to not be true any more.

Q Like what? Can you identify a few instances or specifics?

A This concept of Joe as this independent businessman who had this nonfamily feeling, that he was very objective about running this company and that he wasn't going to try a fast one, that he was working within everybody's, you know, what everybody wanted, now, of course, dad is going to get on Sam's side, kind of thing, but don't worry about it, don't pay attention to that.

[54] * * *

Q BY MR. SHAW: You mentioned you didn't have a car. You were getting ready to go to Aspen. Did Joe offer anything to you at that time?

A Yes —

* * *

Q BY MR. SHAW: Did Joe Shoen offer a vehicle?

A Yes, he did.

Q What kind of vehicle was it?

A It was a Corvette.

Q And did it wind up in Aspen with you?

A Yes, it did.

[59] Q Could you explain to the jury what you observed?

A Yes. We had just broken for a break. We had, you know, an afternoon break. People went to the restroom. I believe I did. I came back, and Joe was looking at Sam's notes, and I, I think I was in there a while while he was, but I didn't see that.

Then Sam came in and said Joe, you are, you are looking at my notes. Please don't. I want my notes.

Q Excuse me, you were in the room when Sam came back in?

A Yeah, I was in the room when Sam came back in.

Q All right.

A And Joe wouldn't give them to him, so Sam tried to take them from him, just tried to hold onto the binder, and Joe pulled it away, and, and started screaming things at Sam.

Q Do you recall some of the things he said?

A Things like, you know, in other words, you know, exactly what he said, some of it I don't think I should say, but some of it —

Q Excuse me, Katrina, let me ask you a specific question.

Did he talk about the company or did he [60] express any, anything to Sam about the company?

A In the words he was saying at that point?

Q Yeah.

A Maybe — well —

Q Only if you can recall.

A I really don't recall specifically. He said he had the right to look at those notes, though.

Q Okay. How did this all, how did this altercation end? What did you recall observing?

A I observed a very clear situation where Sam was being nonviolent and Joe went after him, and then Paul joined it, then Paul joined in on Sam with Joe, and then Mike hugged Paul and tried to take him away and said I love you, I love you, I love you.

Q And did this break up the meeting?

A Yes, and I just have to say that it was very —

Q Let me, let me — broke up the meeting, correct?

A Yes, it did.

Q As you observed this, Katrina, what were you thinking?

A I was thinking Joe is not the objective businessman he says he is, and —

Q What caused you to reach that conclusion at [61] that point?

A The look in his eyes and his behavior.

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[27] * * *

Q Shortly after the consent was presented, your group then entered into the lawsuit and things progressed. Do you recall in March 1989 a shareholder meeting being held in Reno, Nevada?

A [PLAINTIFF MARY ANNA SHOEN EATON] Yes.

Q I think you stated before you attended a number of shareholder meetings prior to this?

A Yes.

Appendix A

[28] Q Overall, Mary Anna, could you describe the general climate or the feel of that meeting when you literally walked into the room compared to the ones you attended before?

* * *

THE WITNESS: Well it felt very confrontational even oppressive.

Q BY MR. SHAW: What do you mean oppressive?

A I noticed I didn't have on a green sticker.

Q Did you observe other people wearing green stickers?

A I observed a security guard in the room.

Q Who were the people wearing the green stickers?

A Board of Directors were wearing green stickers.

Q Anything else you recall about the meeting that made it intimidating or confrontational?

A The way in which it was conducted.

[29] Q Could you describe that briefly?

A Well, there were a set of rules and regulations read right away. Excluded any kind of recording devices and it went on from there. There would be no note taking, no stenographers or no note taking by stenographers and no recording devices.

Q At the conclusion of the meeting or the ordinary conclusion of the meeting did you see a physical altercation break out?

A Yes.

Q Can you describe just generally what you observed?

A Generally what I observed was Mike bent over clutching his tape recorder to his chest and Mark trying to rip it away from him, and I could see very quickly there was a crowd of men around, and I could see through the cracks of Mike's clothes being ripped at.

Q Now the 1989, the next meeting in September of 1989, this was the first meeting held in Tonopah. Did you attend that meeting?

A No.

Q Did you attend the September 1990 meeting that was also held in Tonopah? Did you go to that meeting?

A Yes.

Q Were you in Florida at the time?

[30] A Yes.

Q How did you get to the Tonopah meeting?

A Florida is kind [of] inaccessible. Can't get here unless you go to Dallas or Atlanta. Spent a day before in Vegas, spent

the night at dad's house and then in the morning had like a caravan between my dad's house and Tonopah, which took better part of a day drive. I think for an early morning meeting we left well before lunch. I can't remember.

Q Did you stop for lunch along the way? How many hours do you think the drive actually is?

A Five, maybe six.

Q When you got up at the meeting, what occurred?

A Well, there was a — we signed in. We sat down some management and Board members came onto a little stage area, Joe gave a prepared speech. They passed out the ballots and they left.

Q Now, how long do you think the meeting ultimately took?

A Ten minutes.

Q What were you left to do at the end of the meeting? Did you have a chance to actually give your ballots to the company?

A They took off without so much of a good-bye. Leaving, ran out the back door through the back stage [31] entrance into a car. Personally, I didn't notice they were gone for five minutes. I still had my ballot in my hand. There had been a collection of the ballots. There would be mention of a post part by midnight. In Tonopah in the early evening and already we had —

Q Could you find a post office?

A We made a little fun of it. Actually we found a post office. Got there about 15 minutes before midnight. Put a newspaper — thankfully there was a person still working there behind the window. Took her picture at the window that she postmarked it. Found an envelope and addressed it and gave it to her and got it done just under the wire. We had a little fun looking at a map and trying to get it all put together.

Q Did you have to drive back to Las Vegas?

A Yes.

Q Was this the last shareholder meeting you attended?

A Yes.

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[56] Q Okay. And did you have conversations with other people about, about, about the effect or, or possible effects of the ESOPS?

A [PLAINTIFF MICHAEL L. SHOEN] Yes, I sure did.

Q And as a shareholder sitting there in the company, Mike, in the spring of 1988, what was your concern about what an ESOP would, would or would not do to your position as a shareholder?

A It would — the ESOP, I felt, was simply what I called a control mechanism. It was a device that I, that I understood

was commonly used by, by, by, often by management, but in situations where shareholders were also management.

It was used to, to basically give them a free vote. It is as if — essentially, would take the place of Katrina's vote. They could manufacture the vote, make it as large as they wanted. They could, because they were the directors, and if they had control of the directorship, they could appoint the trustee who voted the ESOP. They could construct the ESOP in such a way with nonpass-through voting so that essentially the directors controlled its vote through the selection of the trustee.

I had absolutely no doubt in my mind as to the purpose of it.

[79] * * *

Q Okay. Could you describe that one, please?

A Well, what happened was I got up, I got up and there were a lot of people around me, or there were people around me in the immediate proximity. There was a security guard who was a lady who was fairly short and had dark, fairly short hair, and she started to lead me out, but she didn't lead me out by the closest door, which I was fairly close to an exit door, but there were a lot of people there.

She led me out through this other anteroom, and she took me by the arm and started to lead me a couple steps.

After I got a couple steps, my brother Joe appeared, and I was somewhat stunned by this point, and I was kind of — it was — I had a quizzical reaction like, what's he doing.

[80] He motioned to her. He replaced her and took my, my elbow as she had to, to appear to escort me out.

What he did was he increased the pressure on the elbow. He then moved the elbow in his hand to sort of control me, and he started to wind up this way.

At that point I knew that I was going to get hit in the stomach, and at that point I had my, this little silver tape recorder that I had borrowed. It wasn't really a real big thing. It was about yo big, so I felt well, if I can pull that tape recorder down to my stomach, I am going to deflect that blow.

I can remember thinking — he caught a piece of it, but I really didn't deflect it. He got me a good hit in the stomach, and I thought well, I know what to do now, I am going down because I have done that before. I am going to fall down forward, and so I proceeded to do that. I fell down forward.

Thereupon came the blows that I received. At that point they were, were far greater in intensity than the first set in the first incident. They weren't separated by, you know, ten seconds or, or fifteen or five or whatever or twenty, I don't know.

Q At the conclusion of this assault, did you get up and leave the meeting?

[81] A Well, when the blows stopped, I didn't put my head up right away because at this point I was concerned about my health, I mean, I was concerned, the blows were hard enough. So I figured, I waited, you know, a second or a split second and I looked up, and there was my brother, Joe, and Harry DeShong, sort of wrestling like two big bears, like wrestling off into a corner, standing by Harry wrestling Joe into a corner.

Appendix A

As soon as I stood up, there was a security guard right in my face, a gentleman with red hair and a mustache, fairly young man, I mean, 25 or something, right in my face and said, get out of here, and you are getting out of here.

By then I was starting to go shake a little bit, and, and I said — I thought, at that point I thought, I looked down and I thought, I still have this tape recorder, which amazed me, and I thought well, maybe I have got tapes back in the meeting room, which by, you know, there was this adjacent room right next to us, so I said, I have got to get my, I think I said my jacket or something, I have got to get something from that room.

He said no, you are not, you are not going to get anything, but he wasn't going to touch me, either, I could tell that.

I said, I want my stuff, and I was concerned [82] that somebody would be taking my stuff in the next room.Then this security guard with, with, the lady with the short black hair came in, and she said, I will take you in there. The gentleman with red hair wouldn't take me. It was my impression that he was afraid to take me into the next room, and I said I need somebody to take me into the next room and get my stuff.

[84] * * *

Q If you could turn your attention to the September '90 meeting procedures, and let me ask you: Do you recall whether or not the 1990 meeting procedures [85] allowed recording of any recording devices of any kind in the meeting room?

A Well, the, there was a prohibition on recording devices of all kinds.

Q And how was that interpreted at the meeting?

A At the meeting — well, at the meeting they allowed the stenographer. I had written them previously and requested them to bring a stenographer, but they allowed my stenographer.

Q This is at the '89 meeting?

A No, this is at the '90 meeting.

Q Okay. So you had stenographers at the '89 and '90 meeting both?

A That's correct.

Q The last several meetings have also been held in Tonopah, Michael. Have you attended those meetings?

A I have not attended since the 1990 meeting.

Q Let me show you what's been marked as Exhibit 257. Would you identify that, please?

A This is a, a compilation of a number of ballots for an annual shareholder meeting of September 28, 1990. I think that there is probably 15 ballots here or more.

Q Okay. The first page of that document, does [86] it contain a number of proposals that were put forth to the shareholders at that annual meeting?

A Yes, it does.

Q One of the proposals there, I believe, deals with nominating procedures for directors?

A I don't think that was a matter that was voted on by the shareholders. I think that was a bylaw amendment. I don't think it is in here.

Q Forgive me. I got a little off track here, a little bit confused.

Let me back up a minute. As the 1990 meeting approached, Michael, did you attempt to nominate anybody for positions as directors within the company or anybody that you are aware of within your plaintiff's group?

A You mean in, in a write-in ballot?

Q Correct.

A No, did not.

Q Did you learn of anything that occurred regarding the nominating procedures prior to this September meeting?

A Yes, I did.

Q What did you learn?

A Well, what had happened was that on May 1 of 1990 the Board of Directors amended the bylaws to change [87] the nominating procedures, and what that did was that they said that you have — any nominations have to be 120 days in advance of the meeting date and that the nominations have to

be done according to certain sections of the securities and exchange laws, which were very, very complicated and required a lot of work.

What happened was that the, the directors didn't tell any of the shareholders that the 120-day requirement existed, so what they did was they, they amended the bylaws to, to include this 120-day requirement. They then filed it with the, with the Nevada Secretary of State, and then four days later the 120-day time period ended.

So for practical purposes, that prevented any shareholder that year from nominating any director and being in compliance with their stated nominating procedures.

Q During this four-day window, you did not receive notification from this company that this occurred?

A No, I didn't. I received it about 20 days before the September meeting, or about 100 days too late.

Q When you look at the proposals that were placed there by the directors for approval of the shareholders there on Exhibit 257, that ballot, Michael, [88] as you look at those, could you identify a few of those proposals that caused you very specific concerns as a shareholder in this company?

A Well, all of them except for six, number six. The last one caused me plenty of concern or I guess more concern.

Q Could you identify which proposal you are talking about?

A Well, starting with number five, amended the articles of incorporation, prohibit stockholder action by written consent.

Q Why did that cause you concern from your perspective?

A Because it just insured that it was, it was one more device that insured that that, the existing directors or, or the directors who, who would be in the future elected by the voting trust in which Jim Shoen, Paul Shoen, and Joe Shoen held a controlling interest, that, that there would really be — that that would be one more thing that would keep them in power because you couldn't get a group — you couldn't have a bunch of shareholders, couldn't get 66 percent of the shareholders together and say, we don't want these guys and let's take a written consent and put in new directors. You couldn't do that any more.

[89] Q Anything else at that 1990 shareholders' meeting that came up that troubled you as a shareholder?

A Sure. The number four that now required that, that number four said that, that, that to amend in the future the company's articles of incorporation, you had to have a 66 and two-thirds majority of the shareholders to do it.

Well, in the worst case scenario, Joe and Jim and Paul and Mark, other voting trusts, would always have more than one-third so that no one could ever, could ever make any changes to the articles of incorporation without them, no one could make any changes.

Q As you go on up the listing there, what's the next item that caused you concern?

A Well, the number three, the, to increase the amount of authorized preferred stock. Part of that was to, to, to do a split, which just made it more confusing, but that was a fairly minor concern.

The real concern was the amount of increased authorized but unissued stock.

Q Why did that concern you?

A Because you could delight anyone with it. You could, you could — they had it sitting there, and if they ever got challenged, they then authorized and had enough stock sitting here so that they could issue it to [90] their friend and, and by this time as we understood, they could then simply — they could literally issue it to their child and have their child put it in an ESOP, and according to what I understood the situation to be, they would dilute out any other new majority.

Q What's the last item on the, on the list there? You are going from bottom to top. What's item No. 1?

A Well, really two more.

Q Excuse me?

A Improve amend — there is the classified Board of Directors, which was, which was, you know, I mean, in the situation that we were in, it was something that I didn't agree with.

Q Could you define what you mean by classify Board of Directors?

Appendix A

A That is called a staggered board where you are really electing people for four-year terms, but because you have to start out, you say well, here's two of the eight directors, will first have a one-year term, and another two will have a two-year and another two will have a three-year and another two will have four years.

Then when the first group comes up for re-election that had one year, then the first time they are re-elected, they then get a four-year term. So you [91] have got all these four-year terms essentially ending up with a whole bunch of four-year terms, so you could come in and have by some, by some situation you could get a group of shareholders that has a 67 percent and enough to come in here and maybe do something and get a change in, in the control of the board, but you could only do it two people at a time, and it would give the remaining board six of the eight, a year's time to take further to, to figure out further ways to protect their jobs and protect their interests.

* * *

Q In January of 1991, Michael, did you learn of an event that, that, in your mind, justified some of your fears about what the ESOP was going to be used for involving a voting trust?

[92] A Well, what happened ultimately, I know it happened by January of 1991, I can't say specifically, what happened was the voting trust or voting agreement that my brothers, Jim and Paul and Joe had, and my sister, Sophia, and my brother, Mark, they then broadened that to include the ESOP so that the ESOP trustee then became a signatory to their voting trust.

Appendix A

By this time the voting trust that had I just referred to had lost two of its members. Paul and Sophia refused to resign by January of 1991, so then the remaining people, which were, which were Jim Shoen, Joe, and Mark, they then added the ESOP, and they added it until 1999, I believe. So what happened was that, that the ESOP, something, something — there was a secondary effect because at that point in time Joe Shoen — there were three individuals who together comprised what was called the trustee, singular, of the ESOP.

Well, Joe Shoen was one. They were appointed by the board, and two gentlemen who worked for Joe were the other two, Gary Horton and Don Mumey. Well, once the ESOP was a signatory to the voting trust, even if Joe Shoen was removed and even if there were people who were what I would consider to be independent trustees in the ESOP, the ESOP had essentially given up its vote to the majority of this voting trust because the [93] voting trust was voted by the majority, so there was sort of a double effect of assuring, in my mind, that the ESOP would then always be voted with Joe Shoen, Jim Shoen, and Mark Shoen.

* * *

Q In September of 1991 did you attempt to deal with your stock in any way?

A Yes, I did.

Q What did you attempt to do with that stock?

A Well, I took a small amount and I was going to give one share — this is after the 400 to 1. I wanted to give one

share to a whole bunch of former employees, and I started off with people whom I knew, and it was just sort of random, and I called them up and said, would you like one share of Amerco stock? These were former employees who had worked with me.

They were all quite pleased, so I got all the paperwork and all the — I got the right paperwork, and I don't recall specifically what it was. I sent it into the secretary and general counsel of Amerco so that they could issue the new stock certificates and send out the new stock certificates to people who were, you know, friends of mine or former long-term employees. Well, they were all former long-term employees, and some of their family.

Q Was this an attempt to [gift] this stock [94] successful?

A No.

Q Why not?

A Because the secretary of the corporation contacted me and wrote me back and told me that they are not going to allow me to give this stock away, that they will consider, they are considering that my gift is, in fact, a sale, and that they are then exercising their right of first refusal and they are going to purchase the shares that I am trying to give away.

So they sent me a check for those shares, and I never cashed it. I put it in a drawer. I would not cash that.

Appendix A

September 7, 1994, 1:35 p.m.

[5]Q Did you also lose your insurance benefits with this company?

A [PLAINTIFF MICHAEL L. SHOEN] Yes, I did.

Q Do you recall when that exactly occurred?

A It was just after we filed the lawsuit.

Q Okay.

A No, it was just after we filed the consent.

Q The consent was filed on June 29, or July 28, 1988. On or about June 29 you lost your benefits with the company?

A That's correct.

Q Has the company taken some other actions against you individually —

A Yes.

Q That cause you concern that you feel is relevant to your position as a shareholder in this company?

A Yes.

Q Could you cite a few examples?

Appendix A

A Well, the first thing I can remember in 1989, it was against — with respect to a mortgage of my children, that my children held, and I was affected because I had ended up paying.

Q What did the company do in relationship to a mortgage that you held?

[6] A Well, a subsidiary of a subsidiary of the company called Nationwide Commercial Credit held a mortgage on the, a note that my kids, my minor kids owed tc them.

Q Excuse me, is Nationwide Commercial Credit a subsidiary of an Amerco subsidiary?

A Yes.

Q I didn't know if that was correct or not. They held the note on this mortgage?

A Right.

Q And what happened in 1989?

A They, at the end of 1989 they wrote me a letter saying that my kids were behind on the mortgage and were going to foreclose.

Q Were you, in fact — was there a delinquency at all on this mortgage?

A No, there never was.

Q Did they attempt to pursue foreclosure?

A No. I contacted the law firm. I retained an attorney in town. I ended up negotiating personally, directly with someone in U-Haul in the Amerco legal department who I knew.

Q As a result of these negotiations, what happened?

A I paid off the mortgage.

[10] * * *

Q BY MR. SHAW: Well, let's move onto a different area, Michael, let's just skip that.

In addition to some of these things we talked about that the Board of Directors did at the 1990 meeting, we went through that, that, through that number of items, six items on the list. Were there some other things that the board did that perhaps didn't quite make it out to the shareholders in terms of the shareholder ratification that you became concerned about?

A Yes.

Q What about the way voting within the Board of Directors is done, did you understand a change was made there?

A Yes.

Q And what was that change?

A Well, in approximately 1991 — I may be incorrect, maybe it was '92, I think it was '91, the board voted to give the chairman of the board essentially two votes. They gave him before this — before this time the chairman only voted when

there was a tie, and, and the board then made a change in about 1991 wherein, wherein the chairman from that time on would have a vote, his regular vote plus his, his tie-breaking vote, so, so [11] in certain instances he would have two votes.

Q You had been on the Board of Directors of Amerco from approximately 1975 through 1984, is that your recollection?

A I think so.

Q Now, while you were on the board during that time period, did the chairman have these two votes?

A No, he did not.

Q Did you learn of anything else that the board did dealing with perhaps a number of shareholders required to conduct certain business?

A Well, yes, I did.

Q What was that?

A In 19 — well, what they did was they reduced the quorum requirements for shareholders' meetings to one-third. This was done in 1991.

Q Okay. And by one-third, you mean a third of the shareholders, only a third of the shareholders had to show up to conduct business?

A That's correct, had formally been at a half, and what had happened was that the, the, that the voting trust that I talked

about earlier lost temporarily two members at that time period, so they didn't have a 50 percent quorum with the loss of those two members.

So, at that point then the board reduced the [12] quorum so, and the effect was that that voting trust of, of Joe Shoen, Mark Shoen, Jim Shoen, and the ESOP would then always be able to have a quorum at a shareholders' meeting.

Q They would always have that 33 and a third percent?

A Yes.

Q Now, Mr. Shoen, are you a party in other litigation that's been brought by your brother against you and your father?

A Yes, I am.

Q Do you understand how that litigation was funded?

A Yes.

Q How did you obtain that understanding?

A Through sworn testimony at which I was present.

Q What is your understanding of how that litigation was funded?

A Funded by Amerco.

* * *

Appendix A

[13] * * *

Do you have any other concerns about anything the board has done with, with preferred stock?

A Yes, I do.

Q What kind of concerns do you have, Mike?

A Well, in 1993, they created — well, they have some preferred stock out there, first of all, that I want to differentiate that is, that is essentially debt, most preferred stock that people think of is debt.

In 1993 they also created or authorized what they call preferred stock B voting.

Q Is this a different type of stock?

A Yes.

* * *

Q BY MR. SHAW: Mr. Shoen, how did you arrive at your understanding of what preferred stock is?

A By reading SEC filings, by reading the Amerco file, by reading the 10-Ks and 10-Qs, by, by reading deposition testimony, by reading affidavits of the treasurer of Amerco.

[14] I also, I have got, I have taken courses, you know, in business, and I know what it is from there. I know what it is based upon my experience working in Amerco.

Q You are not purporting to give us a legal definition here today, are you?

A No.

Q With the Court's permission, I would again ask Mr. Shoen to tell us what his definition of preferred stock is.

THE COURT: You may answer.

THE WITNESS: Well, general definition?

Q BY MR. SHAW: As you understand it.

A Well, my general understanding is that most preferred stock, and certainly most preferred stock that is listed say in the paper, the stock prices, is another form of debt. It is called preferred stock. It is generally not voted, has no voting rights, and generally there is a fixed rate. It pays at like 8 and a half percent, and it's really — it can be a better form of debt than say going to a bank, depending upon what their rates are. That's most preferred stock.

Q Well, is your concern primarily over the debt, the debt aspect of this stock or is it over something else?

[15] A Well, no, the series B, what I mentioned, is first of all, it is only authorized, it's never been issued, but it is a voting preferred stock.

Q Has voting rights attached that could be voted by the holder —

A Yes, yes. And the, and the unusual thing about this stock is that, is that along with the authorization of the stock, which is valued at $20 million, was also created the so-called special committee, which the Board of Directors created in 1993, and the special committee is composed of two members, Joe Shoen and his employee, Charlie Bayer.

They have a number of characteristics. They are empowered by the board to attach any voting characteristics they choose for attaching to this stock any time that they want.

Furthermore, the board also indemnified them in advance of any act they might take, including the attachment of any voting rights they might decide to attach.

So, what this stock, it is very similar in my understanding — in effect it is very similar to a poison pill. It is sitting —

Q You are sitting there as a shareholder today and you see this series B stock, what does that mean to [16] you in your position in the company? What do you feel is the effect of that series B preferred stock?

A It means that they can create votes whenever they want to and as many as they want, and they have got the preapproval of the board and the authority to do that.

September 12, 1994, 9:30 a.m.

[48] * * *

Q Anything about that last meeting that you recall that caused you particular concern as a shareholder?

A [PLAINTIFF CECILIA SHOEN-HANLON] Oh, a few things, but, but one was that we went all the way, all of us, a good majority of shareholders went out there and went into the shareholders' meeting, and there was a lot of signing and things like this, but we sat down, and I can't be sure who came in. It could have been Joe, but I can't remember. I haven't talked about this in a long time.

Anyhow, the gist of it was that they had all the shares they needed to pass what they wanted to pass.

Was this 1990 we are talking about?

Q My question was the 1990 meeting, yes.

A And they had all of these on the agenda, all of which I had opposed, written to the Board of Directors and opposed, which I got no, no, no response from the Board of Directors.

They said they had enough votes. The meeting was over, and that we will have to bring our ballots, mail them in by that day, by that night, postmarked by that date, and this was about, the meeting [49] maybe adjourned around, I don't know, I know it was dusk, and I think it was 5:00, or maybe a little after that. The post office, if there was one in Tonopah, was closed.

We had to drive back into Las Vegas and find the large post office there to mail our votes in.

Q Have you attended any more shareholders' meetings since the September of 1990 meeting in Tonopah?

A Not personally, no.

Q As you sit here today, Cecilia, what is your position, or what is your current situation as a shareholder from your perspective?

A I've been put into a permanent minority position. I cannot get — I cannot sell my stock for fair market value. I would have to go to the Board of Directors, which has been extremely hostile and has not even, has never shown that they would be helpful in any way.

September 13, 1994, 9:05 a.m.

[45] * * *

Q BY MR. SHAW: Now, on the morning of the meeting that you actually wound up attending, Theresa, did you receive a phone call?

A [PLAINTIFF THERESA SHOEN ROMERO] Yes, I received a phone call from the Towers.

Q Okay. And in essence the phone call said, Katrina has already testified, in essence, just come on down, we are waiting for you. Is that your general [46] recollection of the phone call?

A Yes, it is.

Q And you went down to the Towers?

A Yes, we did.

Q What, what happened when you went down to the Towers. Briefly if you could describe when you walked into the room, who did you see there?

A When we walked into the room, it appeared to me as if we had walked into the middle of the meeting. There was a buffet, was already eaten, and most of it was gone anyway, and everybody was sitting in there waiting for us. We didn't get there until the afternoon. I know it couldn't — it had to be sometime after 12:00, and it just appeared that we were walking in the middle of a meeting.

Q So when you walked into the meeting and you got these impressions, what began to take place? What happened next?

A Well, I looked around and I saw that nobody from the, from the plaintiff's side was there. They were all — it was my brother, Joe, Mark, Jim, Paul, Sophy was there, Katrina and me, several of the people that work for U-Haul, and various other people who I don't recall. The meeting — I'm sorry.

Q No, go ahead and describe, did the meeting [47] essentially convene? Someone call it to order?

A The meeting was immediately called to order once we arrived.

Q Who was presiding?

A Joe was presiding.

Q As the meeting unfolded, what took place? What's your recollection of what happened in this meeting?

A My main recollection is when they passed the ESOP, the ESOP had just been turned down less than six months previously, and Joe got up there — well, I am not too sure if it was Joe, but somebody got up there and read the motion, barely stopped to breathe, as far as I was concerned, no discussion took place, the motion was voted on, and it passed.

I couldn't even believe it. I was so shocked I didn't know what to do.

Q Did you have — did you vote for or against —

A I voted against the motion.

Q What shocked you about it? Why were you shocked?

A I was shocked because I felt like I had been trapped, like they had completely railroaded me. They, they had gotten me to come down to this meeting to make a [48] quorum to get this ESOP passed, and that was the whole intention of it, and they were taking advantage of what I considered a very young, naive girl, both Katrina and I, the two youngest girls in the family, they took advantage of it.

[57] * * *

Q Now, after the lawsuit had been going on for some time, did the company take any action directed towards you, specifically?

A They took me off payroll in 1989, around February or March, and they cut off my insurance.

Q Now, did you reinstate your insurance in any way with the company?

A I was on COBRA for 18 months.

Q Let me just — by COBRA, do you mean — tell the jury for those that may not know what COBRA is, what you had to do to keep your insurance intact.

A That meant that I had to pay full price for my insurance, but —

Q Who did you pay?

A I paid Oxford.

Q The company?

A Yeah, the company.

Q Now, did your COBRA benefits run out at some point?

A After 18 months my COBRA benefits ran out.

Q Did you try to get insurance?

A Yes, I tried several places, but —

[58] * * *

Q BY MR. SHAW: Were you — three more questions. Were you able to get insurance?

A No, I was not.

Q What for, I mean, why not?

A Because I have a pre-existing condition.

Q Do you mind telling the jury what that is?

A I have epilepsy.

Q Is that common knowledge within your family?

A Yes, that is.

[59] * * *

Q Now, after this situation with the lawsuit beginning, did you attend the March 1989 shareholders' meeting in Reno, Nevada?

A Yes, I did.

Q Did you see the assault on your brother, Mike?

A Yes, I did.

Q Did you attend the next meeting in Tonopah in September of 1989?

A Yes, I did.

Q Now, how many more meetings did you attend in Tonopah, Theresa?

A I know I attended the 1990 shareholders' meeting, and I can't recall if I attended the 1991 because the 1990 was so devastating.

Q What do you mean it was so devastating? What sticks in your mind about the 1990 meeting?

A Well, after having flown from Phoenix to Las [60] Vegas, taking a cab to my father's house, driving four and a half, maybe five and a half hours to, to Tonopah, got into the meeting room, Joe walked onto the stage and gave about a 5 to 15-minute speech, said that he had enough votes to elect his board and pass his motions, and he said if we wanted to have our votes counted, that we would have to get them postmarked that day.

This was after 5:00. There were no post offices open in Tonopah. There was not another city, except for Las Vegas. We would have to drive back after having gotten out of the car probably not even 45 minutes. We had to get back in the car and drive another four and a half, five hours back to, to Las Vegas and get them postmarked before midnight, which we were able to do.

* * *

September 13, 1994, 1:40 p.m.

[65] * * *

Q. What was the next shareholder meeting that you attended for the Amerco system?

A. [WITNESS RON BELLEC] In 1989.

Q. Now there's been testimony that — was that the September meeting in Tonopah?

[66] A. Yes, it was.

Q. And at that meeting, did you — do you recall whether or not you cast your votes in any way?

A. Yes, I did.

Q. What was the vehicle through which you cast your votes? I mean, was there a ballot that you wrote something on?

A. Yes.

Q. And what did you do with the ballot when you were finished voting?

A. In 1989, I gave it to the tallier of votes, which at that time was Mr. Klinefelter, I believe.

Q. No directing your attention to 1990, did you attend the Amerco shareholders meeting in 1990, in Tonopah?

A. Yes, I did.

Q. Do you recall when you attended, the manner — did you vote at that meeting?

A. Yes, I did.

Q. Do you recall the manner in which you voted at that meeting?

A. Through a write-in ballot.

[69] * * *

Q. BY MR. MICHAEL SHOEN: Mr. Bellec, after the meeting was over, did — were the ballots — was your ballot accepted by any representative of the company at that 1990 meeting?

A. No, it was not.

Q. And were any other write-in ballots accepted, to your knowledge?

A. No, they were not.

Q. And what happened to the write-in ballots that were – that were present at that meeting?

A. After the company management left, the group that was going to vote by write-in ballot got together and selected one of our number to drive to Las Vegas, which was about four and a half to five hours away, to mail the ballots. We had to meet a midnight deadline.

[74] Q. Directing your attention to page 20, to the last — last full paragraph of that page, I'd like to ask you if this Amerco public document form 10-Q, a portion of Exhibit 383, dated September 30, 1990, formed a portion of the basis for your believing that, in fact, the write-in votes of the 1990 shareholder meeting had been counted by Amerco.

A. Yes, it did.

Q. And what in this document gave you that reason to come to that belief?

A. In the four items that were before the shareholders to vote on, it indicates both pro and con. 49,362 for, and 46,435 against. And I have numbers in the other three categories.

Q. And does this, the number of negative votes cast that is mentioned in this public document, correspond to your calculations of the number of votes cast in write-in ballots by [75] what you have characterized as the outside group?

A. Approximately, yes.

Q. Thank you. How did — were there any statements made by anyone representing the company at that meeting, as to whether or not write-in ballots were a proper form of voting?

A. That's correct, there was.

Q. And who made a statement in that regard?

A. Mr. Joe Shoen.

Q. And what did Mr. Joe Shoen say?

A. I can't tell you exactly what he said, but I can paraphrase it. It was something to the effect: At this time, you can vote, and the ballots have been distributed. And you can put an X by the person that you choose, or write in the person's name that you choose below in the appropriate space. And then turn the ballots in to the secretary.

* * *

Q. And did you write in someone?

A. I did.

Q. And I take it it would be someone other than a person that was on the management slate?

A. I did.

* * *

[77] * * *

Q. BY MR. MICHAEL SHOEN: Now Mr. Bellec, did you have occasion to attend the shareholder meeting in Tonopah in 1991?

A. I did.

Q. And how did you vote? What was the mechanism through which you voted at that shareholder meeting in 1991?

A. By write-in ballot that I had prepared the day before.

* * *

[78] * * *

Q. Now Mr. Bellec, were you presented with a ballot at the 1991 meeting in Tonopah from Amerco?

A. Yes, I was.

* * *

Q. Now did that document, Exhibit — identification 264 — did that differ than the ballot that was provided you by the company the previous year, in any significant respect?

[79] A. Substantially.

Q. What differences was there, sir?

A. Major differences that do not provide any avenue for dissenting votes or other — or write-in candidates.

* * *

Q. BY MR. MICHAEL SHOEN: Mr. Bellec, did you have occasion to meet with L. S. Shoen the night prior to this 1991 shareholder meeting, and with him analyze the votes that you expected would be voted at this 1991 meeting?

A. I did.

Q. And can you tell us a little bit about that analysis that you made?

A. I determined that we could win the election.

Q. And why did you — what did you base that on?

A. It had been reported to me, and I believed it to be true, that Paul Shoen and Sophie Shoen had not signed up on the

voting trust agreement from the then inside group, and would not be attending the 1991 shareholders' meeting, and would not be supplying the proxy to anybody.

If either one of those two did not vote, then that meant that the then outside group would have a plurality of the votes present at the meeting and, therefore, could win the [80] election for directors.

* * *

[81] * * *

Q. And did you play any role in the transportation of those ballots to Tonopah?

A. I personally carried the envelope that contained those ballots, in the car to Tonopah.

Q. Now Mr. Bellec, do you recall approximately how many votes L. S. Shoen was voting at that meeting, either by himself or in proxy, in his ballot?

A. Don't have the exact number in mind. However, I do know that it was 57 percent of the outstanding shares present at the meeting.

* * *

[82] Q. Now, how did you, in 1991 at that meeting, transmit these write-in ballots to the company?

A. We personally handed them to Gary Klinefelter, the secretary.

* * *

Q. So then you are telling me that you sent a duplicate set of the ballots through the mail, and you also hand-delivered a set to Mr. Klinefelter?

A. That's correct.

Q. Now Mr. Bellec, did you have occasion, subsequent to this 1991 September meeting, to learn whether or not the ballots that you and I. S. Shoen submitted at that meeting, the write-in ballots, were accepted or counted?

A. Yes, I did.

Q. And when, approximately, did you learn that, whether or not they were counted?

A. I don't know. But within a matter of weeks or [83] months I had determined —

Q. And what did you learn as to whether or not they had been counted?

A. I determined that – I learned that our write-in ballots had not been accepted in 1991.

Q. And what did you base that determination on?

A. The company reported to the SEC via their 10-Q or 10-K, that the management-nominated nominees for director had been elected without opposition, by 30 percent of the outstanding shares of the company.

Q. Now going back to your comment about – now did you have occasion to correspond with Mr. Gary Klinefelter, the secretary of Amerco, on this subject?

A. I did.

Q. Based upon that correspondence, did you — did that further your determination as to whether or not — as to whether or not the company considered the write-in ballots to be valid?

A. Yes.

Q. And what was your understanding, based upon your correspondence with Mr. Klinefelter?

A. That the company had determined that because we had not nominated according to the nomination procedures, that write-in ballots were not legal.

Q. Well, now did the company — in between the 1990 and [84] the 1991 balloting, did anyone from the company communicate to you that write-in ballots would not be acceptable in 1991, as they were in 1990?

A. No, they did not.

Q. Did you make any search of the company's bylaws or articles of incorporation, to ascertain whether or not there had occurred, since the 1991 meeting, a prohibition on write-in ballots?

A. I did.

Q. And what did you find?

A. I discovered that there was no prohibition against write-in ballots, nor had there been any change in the bylaws or articles of incorporation that referred to write-in ballots.

* * *

[94] * * *

Q. Now Mr. Bellec, was there a process with all these exhibits and other letters that you have testified, that we haven't marked as exhibits here — was there a process going on between you and Mr. Klinefelter with respect to your changes in your nomination document?

A. Yes, there were.

Q. Could you explain that, please.

A. I had read what I thought to be the requirements for nomination for directors for Amerco. And in it, it had a clasue that talked about the Schedule 14A from the SEC. And we had to answer all the questions. And I misread that and did not understand that was what was required.

I asked Mr. Klinefelter to tell me specifically and exactly what questions he wanted me to answer with regards to nominees for directorships. And over — through all this correspondence, he finally did answer most of my questions.

* * *

Appendix A

[95] * * *

Q. Mr. Bellec, did you have further correspondence from Mr. Klinefelter? Did you at any time learn that — did you at any time come to believe that in fact you had finally authored an acceptable nomination?

A. Yes, I did.

[96] Q. And approximately when did you come to believe that?

A. Subsequent to all of this correspondence, I have additional correspondence prior to the deadline, which was sometime in April or May, that indicated to me that I had substantially complied with all the requirements. And he said in one of his letters that my nominations would appear and be presented at the next annual meeting.

Q. Who made that statement?

A. Mr. Klinefelter.

* * *

Q. Now Mr. Bellec, were, in fact, your nominations [97] accepted at the 1993 annual shareholder meeting?

A. No, they were not.

* * *

Q. BY MR. MICHAEL SHOEN: Did you come to learn why your nominations were not accepted at the 1993 annual shareholder meeting?

A. Yes, I did.

Q. What was your understanding of the reason they were not accepted?

A. There is a clause in by bylaws that says that at the discretion of the chairman of the meeting, anything that he or she considers to be out of order will not be accepted.

Q. Now that's the restated bylaws of Amerco?

A. That's correct.

Q. Now based upon that experience, do you feel that there is any way that you are going to be able to nominate any candidate, whether write-in ballot or the conventional process, that Amerco had required for any future — future shareholder meeting, and have that nomination accepted or have the vote accepted?

A. I don't see any way possible that a majority of the shareholders can effect a change in management through the election process.

September 14, 1994, 9:40 a.m.

[69] * * *

In, in September of 1990 the board decided to, to start holding meetings in Tonopah, Tonopah, [70] Nevada, correct?

A [DEFENDANT PAUL F. SHOEN] I am not sure on the date, but there was a decision made to start holding the meetings there, yes.

Q Do you recall how the decision was made?

A Not precisely. I remember that, that I believe Jim Shoen opened the road atlas and started pointing out places in Nevada, I believe, at the time he was living there, and since we were, we were a Nevada Corp., that was generally agreed to hold the meetings in Nevada.

Q Really, is it your opinion, Mr. Shoen, that the board has made it extremely difficult for shareholders to attend annual meetings by placing them in Tonopah?

A I am not sure.

Q Well, let me ask you, there is no commercial airlines flying into Tonopah, are there?

A Not that I am aware of.

Q And the shareholders either drive some distance from some point, either, either probably there is air service into Reno and Las Vegas, they probably drive from Reno or Las Vegas?

A Yes.

Q Unless they want to charter an aircraft, correct?

[71] A Yes.

Q And your knowledge in the past is Amerco, in fact, would use its own jet to go to these meetings?

A As far as I know they would. I don't know precisely how they — I don't know for a fact how they get to the meetings. They have had company aircraft.

September 14, 1994, Afternoon Session

[42] Q Well did you represent — let me name some of the Shoen family members, and I'll ask if you can recall whether or not you did represent these specific individuals.

Somewhere around May of 1989, Samuel Shoen, L.S. Shoen, Theresa Shoen, Mary Anna Shoen-Eaton, Cecilia Shoen-Hanlon, Katrina Shoen, and Michael Shoen?

A [WITNESS STEPHEN CASE] I represented all those people. I think your date is correct.

Q It's fair to say you also represented at various times Edward Shoen and Paul Shoen?

A I represented all of you.

Q Thank you. Mr. Case, I'm going to hand you what has been marked for identification purposes as Exhibit No. 221 and ask you if you can identity that document?

A Yes, I can.

Q And what is it?

A This is a letter that I wrote on May 12 of 1989 to Samuel Shoen, L.S. Shoen, Theresa Shoen, Mary Anna Shoen-Eaton, Cecilia Shoen-Hanlon, Katrina Shoen, and to yourself, Michael.

Q Thank you. Have you had an opportunity to review this letter, Exhibit 221, within the past two weeks outside of the courtroom?

A Yes, I have.

Q And looking at that Exhibit 221, this letter of May 12, 1989, is there anything in there that you see today [43] that was untrue when you wrote it on Mary 12th of 1989?

A No, to the best of my knowledge it was accurate.

Q And I am going to direct your attention, Mr. Case, to the first paragraph of that letter only, and am only going to ask you some questions with respect to the basis for — or rather any experiences you might have had that led you to make certain statements in this letter.

Did you have an occasion in the preparation of this letter, or immediately prior to your authorship of this letter, did you have occasion to have a conversation with Joe Shoen?

A Yes, I did.

Q And during that conversation did you come to an understanding that Joe Shoen expressed any bitterness about anything?

A Yes, he did.

Q And what did he express bitterness about?

A He was bitter about attacks on his family, and about process servers waiting and serving his children, minor children.

Q First of all, when approximately was this conversation, or do you recall when the conversation was that you had with Mr. Joe Shoen prior to your authorship of this letter?

A I don't really specifically recall the date, but it would have been immediately prior to my writing the letter.

Q And do you recall where you were when the conversation [44] occurred, or where Mr. Joe Shoen was when the conversation occurred?

A I do. I was in my office in Scottsdale, and Joe was at the offices of Amerco.

Q And did Joe Shoen during that conversation make any statement with respect to making life as difficult as possible under any pretext for any members of the Shoen family?

A Yes, with regard to some stock certificate registration, he said he would make it as difficult as he could.

* * *

Q BY MR. SHOEN: Mr. Case, what statement did he make to the best of your recollection as to — what's your best recollection as to the statement he made with respect to as difficult as possible?

A That he would make the transactions, the registration of stock and the transactions with Amerco as difficult as he could under the circumstances.

Q Okay. Is there any reason that you recall today [45] that you wrote something else down?

A I used the term life. Perhaps loosely. The term life in that – in my context in my mind was related to the transactions that I had been inquiring about.

Q Okay. Now did — at this time did Joe Shoen make any statements with respect to hiring anybody to — to make things as difficult as possible.

A Yes, he did. He said he had hired Ken Pavia (phonetic) for that purpose.

* * *

Q Did he make any further statements with respect to his hiring experts to assist him in this purpose?

A He asked me to relate to U-Haul you could assume he had experts in all phases of the transactions.

Q What transactions was he talking about?

A It's my recollection it related to the reincorporation of some holding companies in Nevada as opposed to the possibility of reissuance of stock of existing holding companies.

Appendix A

September 14, 1994, 3:40 p.m.

[7] * * *

Q How is the right of first refusal handled on your stock? Your common stock has the right of first refusal, too, doesn't it?

A [DEFENDANT PAUL F. SHOEN] Yes, it does.

Q And why is, why is that not an impediment to your selling your stock?

A Well, because the company has agreed to lift the right of first refusal on my shares in order to — so that they can be sold in the public market.

September 15, 1994, 9:35 a.m.

[32] Q In fact, Joe told you that, in fact, he suspected that Katrina was involved in a 13-D filing, didn't he?

A [DEFENDANT PAUL F. SHOEN] I don't know if he used those exact words [33] or, or, or — but that's probably a fair characterization.

Q Okay. Well, if Joe knew prior to July 25th of 1988 that there was a 13-D filing in the works — well, let me ask you this, isn't a 13-D filing something that gives public notice to everybody that wants to go and look at what you are intending to do in conjunction with your shares?

A Yeah. It is, it is a filing required by the SEC that is basically a public disclosure document.

Q Did you ask Joe if he actually knew what was in the 13-D?

A I don't believe we knew what was in the 13-D at all. I was, I was part of those conversations, and, and all we could do was speculate.

Q When Joe told you that he knew about the 13-D, Mr. Shoen, did you question the basis for his knowledge? How did he find out?

A Yes.

Q And what did he say?

A I believe he said that it was privileged information —

Q And you took him at his word, didn't you?

A Yes, I did.

Q You didn't ask him who this privileged [34] source was?

A No, I didn't.

Q Okay.

A He chose to keep it privileged.

[37] Q Remember having your deposition taken, well, on more than one occasion, but I am referring to August 22nd,

1988, a long time ago, but you remember you were deposed at that point?

A Yes.

Q I would just like you to take a look at page 63, line 22, Mr. Shoen, and, and line 22 there. You were asked the question about whether or not — who had all of this information, weren't you?

A I can read it.

Q Please feel free to. Thanks.

A "QUESTION: Did anyone other than Joe Shoen provide information at this meeting on Saturday about the threat of a hostile takeover?

"ANSWER: No, Joe had all the new information."

September 20, 1994, 9:15 a.m.

[77] * * *

Q Now, you say that they paid $100 per share down as par value. First of all, where did they get this much money, $162,000?

A [ATTORNEY-WITNESS JOCK PATTON] There was a discussion there and, and Joe volunteered to, to arrange to finance that $162,000 for them as an individual.

Q Okay. And then were they — well, the price per share was $2,715, is that correct?

A That's correct.

Q That was the total price?

A Per share.

Q How was the difference per share between the $100 and the $2,715 taken care of?

A There was a promissory note executed by each individual to pay that difference.

Q And would you explain to us how a promissory note works?

A Well, a note is the same as you would have with, with your house mortgage. You sign a note and you agree to pay interest and principal over time to retire the debt.

[78] Q Now, this works out to be a big debt for people that aren't independently wealthy. It works out to be, we did the math yesterday, over $4 million in debt that the key employees had.

Was there a discussion about how the key employees were going to pay for this debt and make the interest payments on this debt?

A Yes, there was.

Q And tell us what the discussion was in that regard.

A Well, there were two means of repaying the debt. One was through bonuses because as the board said, the individuals had been historically underpaid, but the principal means by which they intended to do it was to have the company buy back those shares, that stock over time.

The company had a practice in the past many years of buying back stock, and it expected to be buying back some stock in the future to fund some plans that had, that it had in place, so it was expected that those shares would be bought back and the proceeds used to retire the debt.

Q There's been some discussion that the promissory notes that the key employees executed were nonrecourse promissory notes. Is that consistent with [79] your recollection?

A Yes.

Q And, and what is a nonrecourse — how does a nonrecourse promissory note differ from a regular promissory note?

A Well, a regular promissory note signed by an individual means that that person is individually liable to the extent of everything they have.

A nonrecourse promissory note is a note that is secured by something, in this case stock, and the only remedy in the event of nonpayment is to take the stock back.

Q And why was a nonrecourse promissory note used in this case as opposed to a regular promissory note?

Appendix A

A Well, the purpose here was to motivate the employees and give them a reward for, for performance, assuming they did perform and the stock went up. The idea here was not to, to terrify them by giving them, them a huge debt that they would have to pay in the event that things went badly.

The exercise here is motivation, not destruction of an individual's morale.

[98] * * *

Q You are not aware of the voting dynamics that have occurred since 1988 that essentially involved this stock that was issued that night to be in neutral third-party hands?

A I am not aware of it at all.

[100] * * *

Q But what I am saying, if those facts that were presented to you were false or misleading or were half truths or didn't tell you the whole truth, then maybe, through no fault of your own, some of this advice might have been off base and might have been wrong?

A It would entirely depend on the nature of the difference between what I was told and, and what the realities were.

* * *

Appendix A

[105] * * *

Q Well, on July 24, didn't you testify and agree, Mr. Patton, earlier that on July 24 certain shareholders took action by consent?

A [ATTORNEY WITNESS JOCK PATTON] Yes.

Q And by definition when they took action by consent, they had a numerical majority, 50 percent plus?

A Acting as shareholders, yes.

Q And where did they get that, that numerical majority? Did they get it from something that you had advised them to do?

[106] A That was the consequence of what they did.

September 26, 1994, 9:30 a.m.

[91] * * *

Q Well, on the night of the 24th when the formal board meeting was called around 9:00 p.m. or so, that evening, Sunday evening, do you remember the, the 8,099 shares that were being issued?

A [DEFENDANT WILLIAM E. CARTY] I remember that — I don't know, I don't know if I remember it from then or where, but I have [92] heard it so many times.

Q Did you understand at that time that those 8,099 shares were going to change the math and give control from one side to the other?

A I think I understood that.

Q Were you aware that Mr. Joe Shoen personally loaned some, some funds to, to the five key employees so they could go forward with the transaction?

A I am aware of that now. I might have been aware of it then, but I am not sure.

Q Well, did the issue of how these key employees were going to pay for their stock ever come up that evening?

A It probably did. I can't say it did.

Q Were you aware of the amounts of money required to purchase these, the stock?

A I think each person had to put up $160,000, something like that.

Q And that was —

A I think I heard that here in this trial, actually.

Q Okay. I believe it was $162,000 per, per employee was, was in essence the down payment or par value of the stock?

A That's correct.

[93] Q Okay. That still left a balance of, of about $21 million for all five employees?

A Yes.

Q Do you recall any discussions that night, July 24th, about, about Amerco loaning to these five key employees the $21 million?

A I don't recall specific discussions, but I knew what went on, and we worked it out on the board where it made sense, and I don't remember exactly — I thought that it was a good idea, and I supported it. At the time we, we did the best we could, and it looked realistic, when you worked it out.

Q Were you apprised of how this loan was to be a nonrecourse type of thing?

A I am sure all of that type of thing was discussed. That's, that's — I've been, I have run the product end, the marketing end, but never the finance or legal end of the business, and there is plenty of guys there that were looking out for what I was interested in.

Q Do you recall who got the proxies for the stock that was issued that night for those 8,099 shares?

A I think Joe did, but, but I am not sure. I think the board did. I am not sure.

Q All right.

A They were on our side, I will say that.

Appendix A

* * *

[95] * * *

Q Okay. On that weekend, and particularly that night of July 24th at the formal board meeting, were you aware that Joe, Paul, and Jim Shoen, who were all directors, and then Mark and Sophy Shoen were part of a voting trust?

A I don't know if I knew that or not. I should have known it, if I didn't.

Q I'm sorry, what —

A I say, I don't know if I knew that then or not.

September 26, 1994, 1:30 p.m.

[34] * * *

Q. Okay. Well, let's say that Mr. Dodds, in his capacity, after July 24th, 1988, he owed 4.4 million dollars, didn't he, to the company?

A. [DEFENDANT WILLIAM E. CARTY] Whatever the record says.

Q. He owed, what was it, $162,000 to Joe Shoen?

A. I don't know what he owed to Joe.

Q. Well —

A. Yes, I do. I think it was 162,000.

Q. Okay. Well, before we go on that much more, there was some testimony in here from Jock Patton that with respect to whether the proxy to vote the shares of the key employees was given to the Board or given to [35] Edward Shoen on July 24th. Do you recall of your own recollection who it was given to? Was it given to Joe Shoen, or was it given to someone else?

A. I don't recall.

Q. You don't?

A. No.

Q. Well, Mr. Carty, let me hand you what's been marked as Exhibit 402, and direct your attention to Page Number 5, ask you to take a look at that and see if that refreshes your recollection. I will direct you to Page 5 on 402, Mr. Carty.

A. Just a minute.

The proxy was a gift to the chairman of the Board, and he was chairman of the Board, that's correct.

Q. Joe Shoen.

[39] Q. Right.

Well, Mr. Carty, wasn't it true that — that the directors had such control through the shareholder directors, Edward Shoen, Paul Shoen and Jim Shoen, their voting trust, that the Board could actually — board actually knew that which directors would be elected months before the election took place?

A. I — I didn't have that knowledge, I don't know if anybody else did or not. We — they have held stockholder meetings in the board room when I was there.

Q. Right.

Mr. Carty, I am going to hand you Exhibit 530, minutes of the meeting of the Board of Directors of August 7, 1990, ask you to take a look at that document.

You were a director in August of 1990, were you not?

A. Yes.

What did you want me to look at?

Q. First page.

And referring down here to under Roman Numeral I, slate of directors?

A. Yes.

Q. And the second paragraph under there, where it starts out, "Further resolved that the Board [40] affirms — "

A. Yes.

Q. "Directors to be — to be elected"?

A. Yes.

Q. Wasn't that a little presumptuous because — that the Board could affirm in advance the directors to be elected two months ahead of the meeting?

A. That was a mistake in there, Mike. I think that was directed — where it says "elected," I think it was changed to be nominated, that I remember.

Q. So then this exhibit is incorrect; right?

A. That, to me, it's incorrect, if it still says that, because there was discussion about that.

I think it was a typographical error or something.

Q. Just an incorrect exhibit; right?

A. In my judgment, that does not properly state it. Change one word, it does.

Q. Well, let's say that the exhibit is incorrect. Could they, in 1990, know who was going to be elected two months immediate of the annual shareholder meeting?

A. I couldn't tell what Shoens would be lined up with what Shoens two months ahead of anything, so I don't know how to answer that.

Appendix A

September 27, 1994, 1:15 p.m.

[45] * * *

Q Okay. And were you angry at the time you left the meeting?

A I was angry and, and frustrated, both.

[52] * * *

Q — how did you find out that, that Sam and L.S. had met with David Victor?

A [EDWARD J. SHOEN] Well, I was told that.

Q By who?

A By a person whose name I do not know, and that same person furnished me a tape of a telephone conversation between my brother Sam and David Victor in which they discussed a big plan and a small plan —

[66] * * *

THE COURT: The jury is not present. Counsel.

MR. SHAW: Two things, quickly, Your Honor. One deals with some testimony we just heard from the stand about a tape recording; never heard of that before until today. It has never been produced; needless to say we have had outstanding discovery requests and 26.1 required disclosure of the existence of it. More perplexing is the fact it was provided by a person

who Mr. Shoen could not recall. It is kind of like the easel sheets, it now shows up.

I am really troubled by it, and I am troubled by, by the fact that apparently he made up some, some, some of the foundation for Mr. Shoen's beliefs on [67] the, on, on the critical weekend in question here.

Sitting here as the testimony came out, I was perplexed immediately as to what to do about it, perhaps now bring it to the Court's attention. If the tape exists, we certainly want a copy. If it doesn't exist and there is no copy to be found, I ask that that part of the record be stricken and a proper instruction be given to the jury.

I think that it was clearly erroneous to discuss it in this courtroom based on the nondisclosure of the tape.

THE COURT: Excuse me, Mr. Shoen.

MR. MICHAEL SHOEN: Might I join in the same motion that Mr. Shaw has and add a couple of pieces of facts.

I have got 12 volumes of depositions of Mr. Joe Shoen by me here and four different cases, and I can't recall that ever having been mentioned.

Additionally, Your Honor, apparently this information was part of the basis that the board considered. We have depositions, I don't know how many volumes, of all of the board members and the people that were there in those meetings, that that tape has never been mentioned before. It is kind of a devastating piece of evidence that we can't rebut.

[68] THE COURT: Thank you.

MR. SHAPIRO: Your Honor, I believe it had, the subject has come up before, maybe not in precisely the way it came out today, but I would have loved to have heard that tape, too. It doesn't exist, or at least to my knowledge it doesn't exist, and I have asked Mr. Shoen whether it exists, and he said no, it doesn't.

It has come up in response to questions asked in depositions, and I believe the way it came up was he indicated that he knew that his father had met with, with David Victor on, on Thursday of that week and that Sam had conversations with them, knew that David Victor was with them in New York.

When asked, how do you know that, he said, I was given that information by a confidential source.

That's, that's what he is talking about, so he may not — I don't know because I haven't gone back through all these transcripts and that. Most of these cases I have never seen, don't know anything about, but it is possible that, that the statement, you know, tape recording never came up, but he did say confidential source. He has never been able to identify the source. He doesn't know who this person is.

I would love to put a name to it, but he doesn't know, and that's what he has told me, so this [69] subject has all come out and come out exactly the same way and the story has all been told before countless times.

It is possible, although I would ask Mr. Shoen because he has reviewed his deposition more recently than I did, but I don't recall any mention of a tape recording that was given to him by

some anonymous person, but, but the anonymous person who told him about David Victor has all been disclosed, and that's been his testimony from the beginning, so it is not really a new issue.

The only new issue is that he was given a tape of this conversation.

THE COURT: Mr. Shoen, is the tape recording available?

MR. EDWARD SHOEN: No, sir, it doesn't exist.

THE COURT: It does not exist?

MR. EDWARD SHOEN: No.

THE COURT: Did it ever exist?

MR. EDWARD SHOEN: Yes, it existed and I played it for one person besides myself — no, I played it to my wife and, and I played it to my brother, Mark, and I have never played it for anyone else. None of the directors have ever heard it.

THE COURT: And when did you play it for your [70] brother — you played it for your wife? When did you play it for your wife?

MR. EDWARD SHOEN: That Friday evening when I got home and then, and then for my brother, Mark, when he came over, I played it for him. I played it for him, and that's the last time it's been played.

THE COURT: And who made the tape recording?

MR. EDWARD SHOEN: I do not know. A person gave it to me Friday afternoon somewhere between 5:00 and 6:00 after the ordinary close of business at my office.

THE COURT: And you are saying this is someone that you did not know?

MR. EDWARD SHOEN: Someone I do not know.

THE COURT: When was the first time you saw this person that gave you the tape recording?

MR. EDWARD SHOEN: Same day, that evening, late in the afternoon.

THE COURT: Have you seen that person since?

MR. EDWARD SHOEN: No, sir, I have not.

THE COURT: And who destroyed the tape recording?

MR. EDWARD SHOEN: I threw it away.

THE COURT: When?

MR. EDWARD SHOEN: Same evening.

THE COURT: Why did you throw it away?

[71] MR. EDWARD SHOEN: Because the person told me that, that they needed it to remain confidential, and I figured the only way I could keep it confidential was to throw it away.

Appendix A

September 28, 1994, 9:10 a.m.

[44] * * *

And how much did each of the key employees pay?

A [DEFENDANT EDWARD J. SHOEN] 162,000, except one of them paid 161,900.

Q Because he had one fewer share?

A Yes, sir.

Q Okay. Where did they get that money?

A I loaned it to them.

Q You personally?

A Yes, sir.

September 28, 1994, 1:30 p.m.

[6] * * *

Q. And based on all of the information you have, in your capacity as the chief executive officer with Amerco, your meetings with all of these people who were actually going to [7] buy stock, and your own personal opinion, do you have feelings about your own stock? Because you own a considerable amount of stock also; correct?

A. Yes, I do.

Q. What is your opinion as to the value of Amerco stocktoday?

Q. BY MR. SHAPIRO: What is your opinion as to the value of Amerco stock today?

A. That it would sell for somewhere around 20 to $25 per share.

[10] * * *

Q. I want to start with something you talked about late yesterday afternoon as we were nearing the conclusion of the afternoon session.

You were going through a list of things, and matters of — things that you were aware of, things that you heard, bits and pieces of information that was coming to you over the weekend of July 22d through the 25th. Do you recall giving generally some testimony about that?

[11] A. [DEFENDANT EDWARD J. SHOEN] Yes, sir, I do.

Q. Now at the time, you were getting information from a variety of different sources. You testified, Mr. Shoen, about receiving a tape cassette of a conversation between David Victor and Sam Shoen. Do you remember that testimony yesterday?

A. Yes, sir, I do.

Q. Now when did you get that tape?

Appendix A

A. Late in the day on Friday. After 5:00 o'clock, after the close of business.

Q. And it — after the close of business?

A. Yes.

Q. Was it personally delivered to you?

A. Yes, it was.

Q. The messenger, or the person with the tape, personally walked up to you and handed you the tape?

A. Yes.

Q. Was it a cassette of some kind?

A. Yes, it was a normal cassette tape.

Q. A normal cassette, not a little microcassette of — kind of like a song cassette that they have songs on?

A. Exactly.

Q. I think you believed you'd never saw this person before?

A. Yes, I did not know that person.

[12] Q. Can you describe that person to us today at all?

A. Generally.

Q. Was he tall?

A. It was a woman.

Q. It was a woman. Was she tall?

A. No, not a tall person.

Q. About how high?

A. About average height, maybe five-four or five-three. Normal height for a woman. Not a tall person.

Q. Do you remember the color of her hair?

A. Dark hair.

Q. Was she dressed nicely?

A. Office dress. Not pants.

Q. And you had never seen this person before?

A. That's correct.

Q. How did she get up to you after closing? Don't you lock the doors downstairs at 5:00 o'clock?

A. No. We do today. We did not then.

Q. She went right up to — your office is on the 11th floor; right?

A. Yes.

Q. She got on the elevator, went up to 11th floor, and went up to you and handed you this tape?

A. I didn't see her come up. She actually called first. I don't want to miss — she called first.

[13] Q. She called you from someplace?

A. Yes.

Q. Off the premises?

A. From someplace. I don't know from where.

Q. What did she say when you called her — or she called you? Excuse me. What did you say?

A. I said, "Hello. U-Haul."

Q. And what was her conversation?

A. She said she wanted to speak to the president. I told her she was.

Q. And she had the president's number?

A. I don't know for sure what number she had. But you don't have to have the president's number for it to ring. It's widely disseminated. But you could have got it — there's a variety of ways for you to get to that number.

Appendix A

The switchboard stays open till 6:00. You could get through the main switchboard and get transferred up. You could dial it direct. I don't know how —

Q. She might have gotten to you through the main switchboard?

A. It's possible, absolutely. I don't know how.

Q. Did she tell you what she had for you at that time?

A. In a vague way, yes.

Q. What vaguely did she say?

A. She said something to the effect that she had a tape[14] I needed to listen to.

Q. And did she tell you who the tape was between?

A. No, sir.

Q. Did she tell you what the contents of the tape were — was?

A. No.

Q. Did you ask her those questions?

A. I asked her who she was and what it was about.

Q. And did she tell you?

A. She did not tell me who she was. And she said it had to do with the company's business, and she was sure I would want to listen to it.

Q. That obviously piqued your interest, and you invited her to come up and give you the tape?

A. Not exactly, but —

Q. What exactly happened?

A. When she refused to give her name, I said, "Well, you no, I ordinarily, you know, have no place to go. I don't know your name. How can I deal with you?"

And she volunteered something to the effect, "Well, I can bring the tape right by."

I says something to the effect of, "Fine."

Q. And she brought it by shortly thereafter?

A. Within less than 15 minutes.

Q. When you got this tape from her, did you ask any [15] questions of her?

A. I don't specifically recall asking questions from her, no. But — I'm sure I asked her something, but I don't recall.

Q. Did she again try to convey to you what was in the tape, other than something about company business?

A. No.

Q. So at the time you took the tape from her hand, you really had no idea what was on that tape?

A. I had no idea.

Q. There is no labeling on it, or anything at all?

A. Nothing.

Q. She never gave you her name?

A. Never.

Q. But yet she said she wanted to keep this confidential?

A. I don't know if she said that or if I just implied that, but she did not want to give her name.

Q. If she would walk into the courtroom here today, do you think you would be able to identify her?

A. Maybe.

Q. Maybe. Now how did you go about — this was Friday night. And I think you testified you actually played the tape Friday night?

A. Yes.

[16] Q. Now did you listen to it by yourself?

A. Within a few minutes after getting the tape, I went and got in my car and drove home. And about halfway home, I popped the tape into the cassette player of my car.

Q. Okay. And as you put this tape in, did you recognize the voices on it?

A. I recognized my brother's voice.

Q. Did you recognize the other voice?

A. No, I did not.

Q. Did you understand who that other person was?

A. In a general sense, yes.

Q. How did you understand in a general sense who he was?

A. I believe my brother addressed him by his first name.

Q. And what first name did you hear on the tape, Mr. Shoen?

A. I believe "David," but I'm not absolutely certain, as I sit here.

Q. You believe "David." And did you jump to the conclusion it was David Victor?

A. No, I didn't.

Q. Did you come to the conclusion it was David Victor?

A. I did, yes.

Q. As you listened to the tape?

A. Not as I listened to the tape, no. Let me — I am not for a fact certain, as I sit here today. I don't believe I [17] knew it was David Victor as I listened to the tape.

Q. Did you understand what they were talking about?

A. In a general way.

Q. Did it sound like a conversation between an attorney and his client?

A. Yes, it did.

Q. At that time, you were a member of the State Bar, weren't you, Mr. Shoen?

A. Yes, I was.

Q. Were you inactive at that point or were you active?

A. I was active at that point.

Q. Did it trouble you that you might be listening to the privileged communication of a lawyer and his client, Mr. Shoen?

A. No at that time it didn't trouble me.

Q. Does it trouble you today?

A. It troubles me to discuss it here, yes.

Q. Isn't that really unethical to listen to an attorney and client discuss anything, unless they want you to be a part of that conversation; correct?

A. I'm not sure about that, but I wonder what's ethical.

Q. Isn't that one of the first things you learn in law school when you are dealing with ethics, is that you are entitled to keep your conversations between your client, if you are a lawyer, privileged and confidential, under most circumstances?

[18] A. It's a little more complicated than that, but I am generally aware of it, yes.

Q. There was no one else talking between what you have later surmised to be David Victor and Mr. Shoen, was there?

A. I don't understand your question.

Q. It was a bad question. There was nobody else talking in the background? Or you didn't hear anybody else but David Victor and Sam Shoen?

A. There may have been a secretary come on the line at some point, but I absolutely don't recall here today.

Q. A secretary to either one of the parties?

A. May have been. I don't recall.

Q. I assume you also understand the secretaries are also bound by attorney/client privileges?

A. I accept what you say.

Q. Why does it trouble you to talk about it here today, Mr. Shoen?

A. Well, because it may — my attorney pointed that out to me at lunch, that it may violate attorney/client privilege and it may be unethical. He pointed that out to me at lunch.

Q. Did he talk about some of the problems with it being unethical?

A. He just basically said it may be unethical.

Q. Now when this lady delivered the tape to you, I forgot to ask you, did you ask where it came from at all, what [19] her source was?

A. I asked her something, but it was apparent she had no desire to become more involved than giving me the tape.

Q. And, in fact, you took it home. And who else listened to the tape?

A. My recollection today is that I played it for my brother Mark later than evening. And I'm not absolutely certain. My wife may have overheard it. I can't remember if I played it on a tape machine in our house or only in my car. I just can't remember.

Q. Now no one else heard the tape?

A. I don't believe anyone heard the tape, no.

Q. Now Mr. Shoen, prior to hearing about it in this courtroom, you never told anybody about this tape, have you? Other than the people who listened to it.

A. Prior to what point, exactly?

Q. You testifying about it in this courtroom today.

A. No, I told my attorney about it.

Q. And when did you do that?

A. This Saturday.

Q. But you realize that — I think we have heard some testimony earlier about the extent of this litigation, how long we have been at it. But during this six years, you didn't tell your attorney, nor did you tell any of us, i.e., the plaintiffs' attorneys, about the existence of this tape, up [20] until this Saturday?

A. I believe I have answered every question. And to answer that question i , no, I didn't tell anyone until this Saturday, or in open court, until yesterday.

Q. I just wanted that to be clear.

I think this tape — you testified yesterday it talked about a big plan and a little plan?

A. Could be big plan, small plan. Again, it's been a long time, and I don't remember.

Q. Some-sized plan versus another-sized plan?

A. Yes, that's my recollection.

Q. Now do you recall telling any of the directors about this? Just for clarification — I'm sorry to interrupt so quickly, but Mark was not a director in 1988, was he?

A. He was not. That's correct.

Q. And after you played the tape for Mark, did you tell any of the other directors you had a tape of conversations between Sam and David Victor?

A. No, I did not.

Q. If we asked you for the tape today here, Joe, we couldn't get it, could we?

A. No, you couldn't.

Q. Why is that?

A. I threw the tape away.

Q. You threw it in the trash can? Destroyed it? How [21] did you destroy the tape, Joe?

A. I threw it away. I don't recall if I threw it in the trash can or broke it in half, but I don't have it. And I threw it away.

Q. And why did you throw it away?

A. To protect whoever gave it to me.

Q. Even though you didn't know who the person's name was?

A. That's right.

Q. She didn't tell you her name?

A. That's correct.

Q. She didn't tell you where she worked?

A. That's correct.

Q. So if we'd have had the opportunity, or if you had mentioned it six years ago when we asked you those questions, we really could not have identified that person, could we?

A. You might have.

Q. Just by the fact that she is a woman of medium build and wears nice clothes?

A. No, it would have taken more than that.

Q. But that's about all the information you can recall about her today; isn't that true?

A. Yes. But if I'd have been asked six years ago, I probably could have recalled in extreme detail. And I would have had to answer, and someone might have figured it out.

[22] Q. Of course, we didn't know you had a tape six years ago, did we?

A. No, you didn't.

Q. Now in your mind, this tape caused you concern about what the actions of Sam was going to be in New York City?

A. Yes.

Q. It caused you concern by what you heard on that tape?

A. Yes.

Q. It caused you concern. You let Mark listen to it, but you didn't share it with any other decision maker during the weekend of July 23rd or 24th, did you, Mr. Shoen?

A. No, I didn't.

Q. Did you try to relate to them what was on the tape?

A. I tried to review with the people what we knew. And some of the information that we knew was information I had gotten from the tape. Some of it was from other sources.

Q. Did you bother to tell the defendant directors that you got this information from a tape that you no longer had, that you destroyed, that you got from some anonymous source?

A. No, I told them that I knew it for a fact.

Q. Knew the information on that tape was for a fact?

A. Yes.

Q. Of course — excuse me. I misspoke there. That you knew certain information for a fact. You didn't tell the defendant directors where you got that information, in other [23] words?

A. That's correct.

Q. You didn't think it was important for them to know that you got it from a tape, from an anonymous source that you wouldn't identify?

A. No, I didn't.

Q. Or couldn't identify, perhaps?

A. No, I didn't think it was important.

[44] * * *

Q. Anything else you can think about, that you have asked him [L. S. Shoen] to do, that he hasn't?

A. No, I don't recall here today, no, sir, I don't.

Q. So we have a truck study, useful life of truck study, which you are not sure whether he did or didn't do it, or what happened to it?

A. No, I am very sure what happened to it.

Q. And you say he didn't complete it?

A. No, he did — he did telephone conversations with Camille Gaudio. She wrote up the material. She may have sent it to him for editing. I do not know. She then presented it and — attempted to present that material to me. So I do know what happened to that.

Q. In your mind, it was just not of good quality stuff?

A. No, that's not what I am saying here.

Q. I am trying to understand. Did you have a specific complaint about your father's study about useful life of trucks?

A. No, sir, I didn't.

Q. Did you find the work to be acceptable and in line with what you requested of him?

A. I would say yes.

Q. So he performed that duty satisfactorily?

A. Yes, sir, he did.

[47] * * *

Q. BY MR. SHAW: Mr. Shoen, if you could — well, let me take the exhibit away from you here for a second, and I will ask you a question on it.

Appendix A

Under comments up at the far right-hand side, it indicates that L. S. Shoen resigned. Is that what that says up there?

A. It says, resigned, dash, personal.

Q. Personal. It doesn't say "fired", does it, or "laid off"?

A. No, sir, it doesn't.

Q. Doesn't say "terminated"?

A. No, sir, it doesn't.

Q. It implies L. S. Shoen resigned from this company and from this contract?

A. But we know that's not true.

Q. That's very true. Why would it wind up in a company document that he in fact resigned?

A. Someone put that in. That's what — someone must [48] have typed it in.

Q. Well, in fact, Mr. Shoen, would they have typed it in from this document here? I don't believe this is an exhibit, but maybe you can identify that for us.

A. No, I don't believe they could have —

Q. Well —

A. — typed it in from this.

Q. Excuse me. Mr. Shoen, let me ask you a question about that document. That's a personnel action document?

A. Yes, sir, it is.

Q. In fact, the document indicates Mr. Shoen was voluntarily terminated?

A. Yes, it does.

Q. You signed that document?

A. Yes, sir, I did.

Q. He didn't voluntarily get out of his contract, though, did he?

A. Yes, he did.

Q. Oh, he voluntarily told you he wanted to get out of the contract, Mr. Shoen?

A. No, he voluntarily failed to perform his duties, and he suffered the exact consequence that you would get from failing to perform your duties.

Q. And voluntary — well, that's not what that refers to, does it?

[49] A. Yes, it is exactly what this refers to. I filled this out, so I know exactly what it refers to.

Q. Your understanding of voluntary means that he voluntarily took actions resulting in his termination?

A. Yes, sir.

Q. But that particular document usually refers to whether or not the person left the company voluntarily, whether they resigned, terminated, were laid off?

A. No, sir.

Q. What other box could you have marked there under reasons for termination?

A. Well, it says, voluntary. And then it has an asterisk, and says: Explain reason in detail in comment section below. Then in the comment section I have written in, in my own handwriting: L. S. has repeatedly failed to act in the best interests of Amerco. And then I signed it.

Q. Mr. Shoen, there are two other boxes you could have marked there. What are they?

A. Discharge and lay off.

Q. He was discharged from this company, wasn't he? He was fired?

A. I don't believe that, but it won't make any difference. I terminated his employment. Certainly, I terminated the sending of money to him.

Q. You actively took an act that terminated his [50] employment; correct?

MR. SHAPIRO: Objection, Your Honor. Mr. Shaw is simply arguing with the witness over words. I object to the form of the question. It's argumentative.

MR. SHAW: I am not getting very responsive answers, Your Honor.

THE COURT: Overruled.

Q. BY MR. SHAW: Let me rephrase the question, Mr. Shoen. You took an overt act in sending this letter, Exhibit 211, to your father, saying: Unless you get me a certificate saying you have got a certain type of disorder, you are fired?

A. No, sir.

MR. SHAPIRO: Objection, Your Honor. Misstates the contents of the letter.

THE COURT: Sustained.

Q. BY MR. SHAW: Mr. Shoen, you wrote in this letter, Exhibit 211: If your testimony that you did not suffer from this disorder is controverted by a physician's certificate indicating you have a medical condition that would excuse your failure, please provide that evidence to the company for its consideration.

That's what it says, doesn't it?

A. Either I can't hear you or something. I keep hearing something different than it says here. I apologize.

Q. Why don't you read the last paragraph if I keep [51] misreading it. I'm sorry.

A. If your testimony is controverted by a physician's certificate indicating that you have a medical condition that would excuse your above-mentioned failure, please provide that evidence to the company for its consideration.

Q. And just so we are clear, that above-mentioned failure is failure to act in the best interests of your employer, right?

A. Yes, sir.

Q. So you sent him this letter and terminated his employment with Amerco and said: If you can go out and get us a certificate, bring it back to the company — I guess that means you — and we might consider reinstating you. Isn't that what you tried to imply here?

A. Not exactly, no, sir.

Q. Well, as of this date, he was fired, wasn't he?

A. It's a little more complicated with a contract like this. You can't actually fire anybody under that contract, as I understand it. As of this date, I caused his payments to be cut off. There is no mistake about that.

Q. Okay. His compensation quit coming as of the date of this letter?

A. Yes, sir.

Q. And I think you gave him some way to maybe perhaps reinstate the compensation. Isn't what you are saying here?

[52] A. And the contract provides for that. It speaks for itself on that subject.

Q. Reinstate it by simply proving to me you are disabled?

A. Or beginning to perform in the best interests of the employer. Either one would work.

Q. Let me go back to this medical insurance situation. You realize now that by terminating that contract, your father lost his medical insurance at Amerco?

A. Ultimately, I can see that happened. I don't know that that happened. But I could see how that could happen, yes, sir.

Q. Let me just hand you something that will perhaps refresh your recollection, Mr. Shoen. We have heard some other testimony about how maybe your sister Theresa managed to get back on with the company under what I think we all commonly refer to as Cobra benefits. Are you familiar with that? Where you can buy back into a plan if you are terminated from a company?

A. Generally speaking.

Q. In fact, your father attempted to do that, didn't he?

A. That's what this letter indicates. I don't know beyond this letter.

Q. But because of his age, and because he in fact was covered by Medicare, he couldn't even get back on the company [53] insurance even if he paid for it, could he, Mr. Shoen?

A. Yes. This letter says he could extend her coverage, but that since he is entitled to Medicare, he is ineligible for continued medical coverage.

* * *

Q. And did you give any thought to what this termination would do to somebody's — to your father's — to your disabled father's medical coverage?

A. I don't recall doing so. If I did, I just don't recall.

Q. You don't recall whether or not by terminating your father, who you thought was disabled, you didn't give any consideration at all to the fact that he was going to lose his [54] medical coverage?

A. Again, I did not know. I did not think about it. Until I saw this letter today, I never knew that people on Medicaid weren't covered. But it sounds like he got Medicaid coverage. Again, I don't know.

Q. Do you know how adequate Medicaid coverage is, Mr. Shoen?

A. No, sir. I don't.

September 28, 1994, 3:00 p.m.

[51] * * *

Q Well, you felt, Mr. Shoen, that Sam had a lot of animosity towards you and was out to in some way destroy you, didn't you?

A When, sir?

Q Well, in 1987, September. After he left the board in February of 1987, you began to feel that, that your brother Sam was in some way out to destroy you or in some way hated you?

A There was a great deal of personal animosity during various parts of that time, and certainly I took it personally.

Q And in fact, you believe that Sam was literally bent on destroying you and using the company as a battle field to do it?

[52] A I believe he was bent on using the company as a battle field, yes, sir.

Q And bent on destroying you?

A I believe that there is some truth to that, yes, sir.

Q In fact, let me show you what is marked as Exhibit 110. Would you identify that for us, please?

A You have — it is two separate documents there, what we call U-Haul-o-grams. They are handwritten notes from me to my brother, Sam, and they are both dated 7-14-87.

Q They are both signed by you?

A Yes, sir.

Q And in fact, you refer to this, you refer to your belief that Sam, it is apparent to you that Sam is bent on destroying you and using the company as a battle field, don't you?

MR. SHAPIRO: Objection, asked and answered.

THE COURT: Sustained.

Q BY MR. SHAW: Well, the second page of that document, Mr. Shoen, let me ask you some questions.

You believed that Sam was out to hurt you, right?

MR. SHAPIRO: Objection, Your Honor, asked and answered.

[53] MR. SHAW: Not specifically that phrase, Your Honor.

THE COURT: Overruled.

THE WITNESS: Well, that's not what it says here, and I don't believe that's my belief, no, sir.

Q BY MR. SHAW: Well, I don't need you to tell me — have you tell me what this says.

A Sorry.

Q Did you believe that Sam was out to hurt you in any way?

A I believe he would like to have hurt me, yes, sir.

Q Do you believe that Sam had some type of, of continuing fight or feud with you at this time, February to, to July of 1987?

A In July of 1987, I believe that he was very interested in that, yes, sir.

Q Having some type of fight or feud with you?

A On hurting me.

September 29, 1994, 9:10 a.m.

[38] * * *

Q For the last two years, Mr. Shoen, do you recall how much you have made as president and CEO of Amerco?

A Not exactly. I could get close, but no, I don't recall exactly.

Q Well, let's, let's — let me hand you what's been marked as Exhibit 545. It is a compilation of proxy statements. I believe I have the 1994 proxy here.

Does that refresh your recollection, Mr. Shoen?

A Yes. Again, I would have to add it up, but this is, this is consistent with my recollection.

Q And how much exactly have you made the last two years?

A You want to know —

Q Well, the base compensation.

A Base compensation has been $175,000, and I think it is now up to $210,000 over that period of time. This doesn't really show that, but.

Q It shows some additional bits of income that, that trickle in from the company from other sources?

[39] A It is just calculated different, but that's, that's — I know what my base salary is.

Q Well, what does the '94 proxy statement reflect?

A It shows salary of 207,798 and a bonus of 2,101,490.

Q The $2.1 million bonus was for fiscal year '94?

A It was in, in fiscal year '94, I believe, yes, sir.

Q So you have received that bonus as of today?

A Yes, sir.

Q Have you received any other benefits from the company, Mr. Shoen, in terms of favorable loans or anything like that?

A In what period of time?

Q Within the last two, three years.

A I borrowed from the company this year about a million, $100,000 for about 90 days. I don't know if it is in here or not.

Q And what kind of interest rate did you pay on that?

A I paid Amerco's cost of the money, whatever the cost of the money was. I don't remember the exact number, but I had the treasurer show me exactly how much [40] it cost the company to loan me the, to loan me the money, and I paid that much.

Q And Amerco gets a little better rate than you or I would if we walked down to the neighborhood bank?

A I think quite a bit better rate.

Q Do you have any extraordinary expenses, Mr. Shoen, that, that depletes your income?

A I don't know what you mean.

Q Extraordinary outgo or expenses that deplete your average income, your 200,000 plus base salary and your bonus?

A I don't know the answer.

Q Well, beyond just normal food, housing, clothing, bills, do you have anything that would be considered extraordinary expenses that you have to pay on a regular basis?

A I don't think so. Again, I don't know. I am not sure I understand your question.

Q Well, you specifically pay child support, Mr. Shoen?

A No, my children live with me.

Q They live with you. Do you pay any spousal maintenance to your ex-wife?

A No, sir.

September 29, 1994, 1:30 p.m.

[33] * * *

Q When you got to the Towers, what was, what was the first thing that you can recall that was discussed in terms of the threat? What was the first thing that sticks out in your mind?

A [DIRECTOR-DEFENDANT JOHN DODDS] That there was a possibility of a takeover by a corporate raider.

Q Isn't it true, Mr. Dodds, that Joe Shoen very specifically conveyed to you the information that Paul Bilzerian was teaming up with Burnham Lambert to buy the company, sell it in pieces, and destroy the organization?

A Not that I recall, no.

Q Well, grab your deposition again and turn to page 68, actually begin on page 67, line 22.

"QUESTION: You were there at this meeting; you heard Joe Shoen say whatever he said. What was your understanding of the purpose of his presentation? How did you interpret that" —

A I don't follow your page. What page?

[34] Q Excuse me, it is page 67, line 22. I will go ahead and reread the question.

"QUESTION: You were there at this meeting; you heard Joe Shoen say whatever he said. What was your understanding of the purpose of his presentation? How did you interpret that?"

And then continuing on page 68, line —

A I don't have that page. It goes from 67 to 69.

Q Well, why don't you just go ahead and read your answer on page 68, line 3.

A "ANSWER: That a corporate raider was going to take over this organization, named Paul Bilzarian, that an investment banking firm who we believed to be at that time Drexel Burnham was arranging the financing. Their intent was to sell the company in pieces and basically destroy the organization."

Q Thank you. Now, it turned out that there was no Paul Bilzarian, didn't it?

A Yes, there is a Paul Bilzarian.

Q Well, you are absolutely right, I misspoke. There was a Paul Bilzerian, but no one getting ready to take over Amerco that night, was there?

A Not as it turned out, no.

Appendix A

October 3, 1994, 9:30 a.m.

[11] * * *

Q BY MR. MICHAEL SHOEN: Mr. Dodds, why don't we just start and figure out who the ESOP trustees were.

Do you recall, as a board member, appointing ESOP trustees on or about July 26, 1988, when the ESOP was first formed?

A [DEFENDANT JOHN DODDS] Yes.

Q Do you recall whether or not you were an ESOP trustee?

[12] A Yes, I was.

Q Okay. So — and did other individuals serve with you?

A Yes.

Q And who served with you?

A I believe Harry DeShong was one of them. I am not positive.

Q And was, was Mr. Gary Horton an ESOP trustee?

A Mr. Horton is the treasurer, yes.

* * *

Q Okay. Well, what about any date? Do you recall whether or not you, you continued as an ESOP trustee after, after the key employees sold their stock back to the ESOP?

[13] A I believe I did. Again, I would have to see what it changed because I don't recall that.

* * *

[14] * * *

Q And did you continue as a trustee?

A Yes, I did.

Q And then they were the, the, all the trustees, is that — there were no more trustees in [15] addition to those people, sir?

A No, there were not.

Q Okay. Thank you.

And then did there come a time when, when you were no longer an ESOP trustee and, and all these people were replaced as ESOP trustees?

A Yes, there did.

Q And who were they replaced with?

A I believe it was Gary Horton went back on, the one previously, and Donald Murney and Joe Shoen.

Q Thank you. Now, Mr. Dodds, at the time you were an ESOP trustee, you and Mr. DeShong and Mr. Horton shared a few characteristics that you were — you owed $162,000, is that correct, to Edward Joe, Joe Shoen?

A Yes.

Q And you also owed, was it 4.4 or just under that, million dollars to Amerco?

A I believe it was 4.3 something.

[16] * * *

And now, I would like to ask you some questions about what happened at this July 10-11 meeting here in 1989 in Exhibit 329. Have you still got that in front of you?

A Yes.

Q Would it be fair to say that there were a lot of things done that affected the ESOP at that meeting?

A Yes.

* * *

[17] * * *

And getting back to this, to this meeting here, it looks like, like one thing they did on page 4 was they tolled the obligations that you owed, and it looks like on, on page 5, the next page, they directed the company to enter into a variety of different

credit agreements to provide up to $20 million to the ESOP. Is that basically a fair characterization of that?

A It was 30 million.

Q 30 million, okay.

And did they also authorize on page 5, the same page, the treasurer and the secretary to take what actions are necessary to execute all these matters?

A Yes.

Q And then on the next page, page 6, did they also ratify any of these actions at the top of the page, ratify any actions that, that had to be taken?

A What page was that, sir?

* * *

Q Did you answer my question?

A No, I have not until I read it. Yes, it does.

[38] * * *

Q Thank you. Now, let's go to, to Mr. Horton. We could really use these characteristics from Mr. Horton, couldn't we, Mr. Dodds? Would it be, would it be all right if we circled them, this stuff, and brought it down here for Mr. Horton?

A No.

Q No, okay. What would you do that would be different?

A I don't believe Mr. Horton had, had, 162 — I don't believe he owed 4.3 at that time.

Q Right, he had paid those monies back?

A He had done something, I don't know what the exact numbers are.

Q This was in 1991, but he reported to Joe Shoen, didn't he?

A Yes.

Q And at that time Mr. — do you recall when Mr. Horton and Mr. Murney and Joe Shoen became the ESOP trustees?

A I don't know the exact date, no.

Q Now, Mr. Murney, he reported to Joe Shoen, did he not?

A No, I believe he reported to Mark Shoen.

[39] Q To Mark. He did at this time. How do you know that?

A Because he was the treasurer for U-Haul International.

Q And Mark Shoen was treasurer during what period?

A Mark Shoen wasn't the treasurer.

Q Was the president of U-Haul at what time?

A 1990.

Q And who is the president of U-Haul now?

A Joe Shoen.

Q So now Mr. Murney reports to Joe Shoen?

A Now he does, yes.

Q So Mr. Murney reported to Mark Shoen, who was also a member of this voting trust, and to Joe, right?

A That's correct.

Q Okay. Now, do you recall when Mr. Murney joined U-Haul International?

A No, I don't recall the exact date.

Q Well, let me refresh your recollection. If I told you that it was sometime in 1990 —

* * *

[40] Q BY MR. MICHAEL SHOEN: Have you got the minutes up there of the, of the meeting of the, of the Board of Directors, Mr. Dodds?

A Yes, there is a stack of them here.

Q Sure. Could you turn to the June 10, 1990 minutes?

A I have a June 5th, 1990.

Q Is there a June 10, 1990 minutes?

A Goes to July 10.

Q Well, let me take a look at them, please. I apologize. I was, I was — I should have directed you to the July 10 meeting. Take a look at the July 10 minutes and see if you can ascertain from those minutes when Mr. Murney was, was appointed as ESOP trustee.

A At the board meeting of July 10, 1990.

Q That's fine. And do you recall, Mr. Dodds, when Mr. Murney joined the company?

* * *

Q BY MR. MICHAEL SHOEN: Let me hand you a 10-K for, from Exhibit 382 for 1991 and ask you to take a look at it and see if that would refresh your recollection as to when Mr. Murney joined the company. I will direct your attention to page 26. Page 26 may be [41] one of the tabbed pages, Mr. Dodds.

A Yes.

Q And do you recall now when Mr. Murney joined U-Haul International as its treasurer?

A June of 1990.

Q A little over a month before he was appointed as the ESOP trustee?

A Yes.

Q And Mr. Dodds, would it be fair to say that, that that was a lot of responsibility for, for Mr. Murney considering his age at that time?

A No, I don't believe it was. He was a finance man.

Q Do you know how young a man Mr. Murney was at the time that he, that he joined and became the ESOP trustee?

A No, I do not.

Q Let me see if I can refresh your recollection. Take a look at page 17 of this document and read it, look through the top of it.

* * *

[42] * * *

Q He was a pretty young fellow compared to you and I at that time, anyway?

A No, at that time I was the same age; it was at that time.

Q I am talking about 1990, June or July.

A 1990, June or July, he was a 30-year-old man.

October 3, 1994, 9:00 a.m.

[32] * * *

Q Mr. Dodds, do you remember yesterday that we sort of went round and round on this preferred series B stock, and I ended up crossing it off, off my list?

A Yes.

Q Did we agree, though, that the board, while the board had authorized it, you were under the impression that they had not issued it?

A Yes.

Q In front of you, I think you have got Exhibit 329, which were the director's minutes, and I would like to ask you if you could take a look at the [33] last minutes there, November 2, 1993, and if you could, turn to the, to the fourth page, and directing your attention to the second full paragraph there this language, "Now therefore, be it resolved, that this Board of Directors does hereby authorize and approve the issuance and sale by the company of an up to an aggregate of $20 million of its series B voting stock"?

A Yes.

Q Mr. Dodds, really, isn't what the board has done is they have authorized and then pre, and then preapproved the issuance?

A States, what it says, "Was authorized and issued," but then it was up to the committee to decide whether we were going to do it with the registration of the other stock, as I testified yesterday.

Q Okay. And that's the, the special, the special committee of Joe Shoen and Charlie Bayer?

A Yes.

October 3, 1994, Afternoon Session

[5]Q Let me ask you some questions about taking over from the inside, see if you we can arrive at a way a take over can be accomplished from the inside. Could you secure a controlling position through the issuance of stock and thereby end up with controlling the Board of Directors as a first step?

A [DEFENDANT JOHN DODDS] Under certain circumstances I'm sure you could.

Q Through your control of Board of Directors, Mr. Dodds, could you then take one after the other, year after year, to ensure that the power of a certain voting trust is increased and the power of any other shareholders is decreased?

* * *

Q BY MR. SHOEN: Mr. Dodds, what about staggered Board of Directors. Can, through control of the Board of Directors can shareholders cause staggered Boards to occur?

A Board of Directors can have staggered Board of Directors for whatever reason they want.

Q Amerco has more than one, doesn't it?

A One what, sir?

Q One staggered Board?

A As far as I know it has one Board, that's it.

Q What about staggered Board subsidiaries?

[6]A Subsidiaries, not Amerco itself.

Q Fine. What staggered Board, what subsidiaries of Amerco have staggered Boards?

A U-Haul International has one.

Q UHI.

A And I'm not aware if others do or not I. Really don't know at this time.

* * *

Q And if you could look at the third page and see if that would refresh your recollection whether or not Ponderosa Insurance Company has a staggered Board?

* * *

A And Ponderosa Board is a staggered Board, yes.

* * *

Q And what is the other company?

A Amerco Real Estate Company.

* * *

Q What is the effect, in terms of someone else having control of this company, of Amerco, and delaying the[8] achievement of that control by this two-tier staggered Board?

A None as far as I can see under those three organizations there.

Q Well, to change the staggered Board of anyone of these three subsidiaries, Mr. Dodds, wouldn't one first have to acquire voting control of Amerco?

A Yes.

Q And how long would that take to do?

A I have no idea.

Q After one — let's say just for purposes of questioning that it took in a third year, one could acquire the control of the staggered Board of Amerco?

A If you could get that many votes to do at that year, yes.

Q Would that third year point, at that point you would then be able to begin to attempt to vote the stock of Amerco, which owns the stock of these three subsidiaries, at that point

you could then begin the process of obtaining control of these three subsidiaries, Mr. Dodds.

A Yes.

Q Do you know how many years it would take for a person, after a period of time had acquired a control of Amerco, to even then acquire control of staggered Board of those three subsidiaries?

[9] * * *

THE WITNESS: Yes.

* * *

[10] * * *

Q Now, Mr. Dodds, the way staggered Board works is that they initially have staggered terms of one year and [11] two year and three and four. Everytime someone, one of the directorships is up for reelection, they are reelected for another four years, aren't they?

A Yes.

Q So as the time goes on, and as years roll by essentially every directorship that's up for reelection has a four year term. Some have three years and some have two year left and some have one have one year left at any given point in time?

A Yes.

Appendix A

* * *

[12] * * *

Q Now, Mr. Dodds, now if we had one individual who is empowered to vote the stock of UHI that was controlled by the Amerco Board and we have 8 people on the [13] Board, Martin, Paul Shoen, Charlie Bayer, Hap Carty, John Dodds, James Shoen, Mark and Edward, those are the people that were on the Board in 1990; is that not true?

* * *

A No, sir.

Q Okay. Well can you tell me by looking at these minutes of May 1, 1990, if there were other people on the Board that I haven't mentioned?

A No.

Q So are there other people that I didn't write down that were on the Board that you would like to mention to me?

A No. The you state Hank Martin on that Board, I see it is correct. He used to be on Ponderosa it. Says on this minutes she is on the U-Haul Board.

Q Mr. Dodds, Mr. Martin had one year Paul Shoen had one year, Mr. Bayer and Mr. Carty two years, Mr. Dodds and Jim Shoen's three years, and Mark Shoen and Edward Shoen has four years; is that correct?

A Yes.

Q Now if you have a eight-man Board, how many positions would you need to make whole a majority position?

A You have to have six.

[14] * * *

Q BY MR. SHOEN: Let's try to go at it a different way and keep it as simple as we can. If I have had the voting power of Amerco, and in your year one I elected two directors, in these directors position Mr. Martin and Mr. Paul Shoen, how many directors I have elected?

A Two.

Q In year two I elected two additional directors to fulfill the position formerly held by Mr. Bayer and Mr. Carty, how many directors would I have?

[15] A Four.

Q In year three, Mr. Dodds, if I elected two more directors to fulfill the position of Mr. Carty and Mr. Dodds, how many total directors would I have then elected?

A Six.

Q Now, Mr. Dodds, what about Serial Common A Stock, is that just the ability to authorize more stock and a controlling group of shareholders to elect a Board of Directors that would do that for them?

A You can not authorize anymore shares of what you have listed in the treasury. You can exchange shares by serialization but not authorize any more.

Q Who authorized shares to begin with? Who does that?

A The shareholders.

Q And if you have a group of controlling shareholders who have the vote, they have the power to then authorize more shares; is that not true?

A Board of Directors makes a reeommendation to shareholders and then they may vote to pass that, yes.

Q Well, isn't it true, Mr. Dodds, that's exactly what happened in this case in October of 1992 in Amerco?

A I have to look at that and see.

Q Direct your attention to Exhibit Number 545?

A That in this package?

[16] Q That's in a different exhibit, Mr. Dodds. I think it's under — if you look — you got hold I believe that under there is the thicker document will be Exhibit 545 if it's not then five four five would be this one over here. Could you identify this document please?

A This is a proxy statement.

Q And for what date?

Appendix A

A March 4th, 1989.

Q Now, Mr. Dodds, did the — in October of 1992 did the Board make a recommendation the shareholders and Amerco approve the authorization of Common Serial Stock.

MR. SHAPIRO: Do you have a page number, Mr. Shoen.

Q BY MR. SHOEN: Directing your attention, Mr. Dodds, to Page 20 would be starting on Page 21 and then the explanation continues through Page 25.

A Would you show me in this exhibit goes from five to ten and two to eight. In what section of it?

All right. What is the question again.

Q The question is, Mr. Dodds, doesn't the shareholders, the Board recommended the adoption of Common Serial Stock and the shareholders vote for that in October of 1992?

A Yes.

Q And do you remember whether or not it was[17] called Common Serial-A Stock?

A It just Serial Common Stock.

Q Now directing your attention to Page 23, would it be a fair statement to see that Common Serial Stock authorized can create voting impediments to frustrate or defeat an attempt to secure control of the companies?

A Yes.

Q And this proposal passed, did it not Mr. Dodds?

A Yes.

Q Now do you know who has Common Serial Stock today of Amerco shareholders?

A Not everybody that has it — I would have to see in my documents some have changed it, some haven't.

Q Did you as a Board member vote approving the exchange by Edward Shoen, Joe Shoen to exchange his Common Stock for Common Serial Stock?

A Yes.

Q And did you as a Board member vote to approve the exchange by Mark Shoen of his Common Stock for Common Serial Stock?

A Yes.

Q And same question for Jim Shoen?

A Yes.

Q Did you vote to approve the exchange of any of Plaintiffs Stock for Common Serial Stock?

[18] A I don't know plaintiffs requested that.

Appendix A

[20] * * *

Q Well, Mr. Dodds, can a group of controlling shareholders also elect a Board of Directors that will create some stock options for certain executives? They can do that, can't they?

A Any Board can do that.

Q And then if the Board wanted to, depending on what it wanted to do, it could issue however much stock it [21] had authorized or wanted to authorize and effect control, couldn't it, amongst existing shareholders?

A It could only issue authorized stock. It couldn't authorize anymore itself. The Board can't do that.

Q That was done in 1992, wasn't it?

A Yes, the shareholders did that.

Q The shareholder majority that we talked about, that resulted from the issuance of Key Employee Stock?

A Partially, yes.

[22] * * *

Q Now, Mr. Dodds, do you recall this two-third super majority requirement appointment to the bylaws that was passed that requires that a two-third majority approve any sale of the corporation or merger?

A Yes.

Q And under the definition of the bylaws, it's true, isn't it, that the directors or people nominated by the directors or approved by the directors they don't — if there was a group majority of shareholders that wanted to sell or merge a corporation that they were approved by the Board of Directors, a 66 and two-thirds majority would not be required?

A I believe that's correct.

* * *

[23] * * *

Q Now could a controlling group of shareholders, through share control of Board of Directors, end up causing the company to retain shareholders they wanted as consultants?

A The Board can hire anybody they want as a consultant.

Q And two of the ~~people~~ they hired were Paul Shoen and Sophia Shoen; is that correct?

A Yes.

Q And do you recall how much Sophia Shoen is paid a year as a consultant?

A I believe it is $100,000.

Q Do you know what she does for that $100,000?

A She is supposed to advise the Board on various properties.

Q Has he ever advised you?

A Not me personally, no.

Q Mr. Dodds, do you think it's right for the Board to spend the companies money, say on a consulting agreement, in order to cause a shareholder to join another shareholders voting trust?

A No.

[30] * * *

Q Now, can the Board, if it wants to, amend the bylaws so they could appoint a resigned director who resigned during the 120-day prenomination period? During that period appoint a director to serve not only through the 120 days until next year election?

A Yes.

Q And would it be fair to say that might be a resigned director who resigned during the 120 days?

A Yes.

Q And I take the Board if it wished could — well [31] first of all did the — was this done by the Amerco Board, did they create such a change in the bylaws, to your recollection?

A Yes.

Q And do you recall approximately when that was done?

A No, I don't know the date.

Q Was it done after July 24, 1988?

A Yes.

Q And, Mr. Dodds, can the Board of Directors authorize special employment contracts, if they would like, in the event of a take over?

A They could authorize the president of the company to do that, yes.

Q Do you know whether or not that has been done?

A I know of none.

Q By these special employment contracts, what are you — what do you mean when you gave your answer?

A The Board can authorize the president of company to enter into a contract with certain individuals relative to their continued employment in the event of a take over, under what is called a golden parachute I know of none that have been done.

Q You are — so no golden parachutes have been created?

[32] A Not that I know of.

Q Do you know if anyone authorized anyone to create golden parachutes?

A Yes.

Q When approximately was that done?

A I believe that was back in the early part of July, though. I believe probably that period.

Q Can that have somewhat of a similar effect to a Poison Pill in an operation?

A It can.

Q Sort of make the change of control so expensive it is not worth changing control?

A If you do that, yes.

Q Can the Board, if the it wants, change the — reduce quorum requirements for a shareholder meetings?

A I'm aware of that.

Q Can a group of controlling shareholders do that, let's says, who had 50 plus percent?

A I don't know that to be true or not true.

Q Have the quorum requirements for the annual meeting of Amerco been reduced to 33 and a third percent from 50 percent plus?

A I don't know what is being done. I don't remember that without looking at a document.

Q Would it be fair to say a group of controlling [33] shareholders could do that?

A That, I don't know that.

Q Well, could the Board recommend to the controlling shareholders that the quorum be reduced from 50 plus percent to 33 and a third?

A Yes, the Board can make a recommendation.

[62] * * *

Q Now, you got to speak with Mr. Patent [*sic*, should read Patton], did you not, July 23rd and 24th?

A I believe it was July 24th only.

Q Do you recall him taking about a fair price provision recommendation that he made —

[63] A Yes.

Q — to the Board of Directors. And Amerco hasn't created a fair price provision in its bylaws Article of Incorporation, has it, Mr. Dodds?

A No.

Q And is it fair to say a fair price provision means that really can't have a two-tier tendered [*sic*] offer? Is that what a fair price provision prevents, amongst other things?

A I couldn't answer that.

Q Does a fair price provision ensure that one group of shareholders, such as the Joe Shoen voting trust, isn't able to sell majority interest at a higher price and then leave the minority, other group of shareholders to take a different price, is that your understanding?

A No, that's not my understanding.

Q What is your understanding of fair market provision?

A Mr. Patent [*sic*] suggested that in order that the plaintiff shareholders would not be able to sell their stock at a hire [*sic*] price than the other shareholders, as best I recall. We did not adopt that.

Q But a fair price provision would prevent any group of shareholders who had a majority from selling at a higher price than another group, isn't it?

[64] A If it had been put in effect. Just like the supermajority came up with the same type of deal.

Q Why didn't you put into effect today, Mr. Dodds, in the last six years?

A Didn't feel it was necessary.

Q Did you feel it might give some protection to the plaintiff shareholders?

A I don't believe there is protection necessary in that matter.

October 4, 1994, 1:30 p.m.

[8] * * *

Q. Of course, when you took the actions you took on July 24th, 1988 the only thing you had heard about Mr. Bilzarian's relationship with your brother Sam, Mr. Shoen, is that they had lunch and they went to Harvard together?

[9]A. [DEFENDANT EDWARD J. SHOEN] A small bit more than that, but that's basically it, yes.

* * *

[82] Q. And in fact, when you got the call from Joe, you assumed it had something to do with a family fight, didn't you?

A. [DEFENDANT AUBREY JOHNSON] Yes.

Q. And it was very specific in your mind that it had to do with the family fight?

A. It had to do with the family.

Q. And you believe — well, isn't it true that you believed that there was essentially a family fight going on over this corporation?

A. Yes, it had been going on for some time.

Q. And it involved essentially all the major significant[83] shareholders?

A. That's right, yes.

Q. Now when Joe called you on that Saturday, he didn't ask you to do anything, but just kind of stand by?

A. He called me on Friday.

Q. He called you once before, calling you to tell you to get on the plane?

A. That's right.

Q. Whenever he called you, all he did was just say, "Stand by. There may be a problem"?

A. Yes.

Q. He conveyed no other information to you?

A. That's true.

* * *

Q. On your way back to the airport with Mr. Dodds — from the airport to the Towers, did you have any conversations with Mr. Dodds?

A. No, not about what they had talked about on the 24th or the 25th.

[84] Q. 10-, 15-minute drive from the airport back to the Towers?

A. Yes.

Q. Well, the conversations you had with Mr. Dodds were about what was talked about?

A. No, not at all.

Q. What did you discuss?

A. We discussed the weather in Wisconsin, the weather in Arizona.

Q. Nothing was mentioned about what Mr. Dodds had been privy to, or the fact that he had been in discussions all day Saturday?

A. No, sir.

Q. This is a little after 9:00 o'clock you are picked up at the airport?

A. Right.

Q. Did Mr. Dodds happen to tell you, Mr. Johnson, that they had had the plaintiffs essentially under surveillance at the Plaza Hotel?

A. No, I had no discussion on that.

Q. At any time during the night of July 24th, 1988, did you learn that the plaintiffs were staying at the Plaza Hotel?

A. I don't know if I learned that or not.

Q. Did you learn that at any time that any members of the Board of Directors, including some of the shareholders that [85] were also on that Board, knew exactly where the plaintiffs werestaying on Sunday evening in New York City?

A. I had no idea of knowing anything until I got into the Board meeting.

[85] * * *

Q. Okay. As the Board meeting convened, Mr. Johnson —

A. Yes.

Q. — were you informed that the plaintiffs had been under surveillance at the Plaza Hotel in New York City?

A. I can't say specifically, but when the meeting opened, Joe made several comments to bring me up to date. That easily could have been one of the comments. I assume they did the best job they could to inform me of everything that I needed to know to make a decision.

Appendix A

[94] * * *

Now at this meeting, you said that Joe gave you a little — opened it up with a little presentation?

A. Yes.

Q. And he told you what he knew?

A. I assume he did.

Q. And who else did you hear from about what they knew at the time?

A. I think he summarized everything that the whole group there knew for me.

Q. Did you question the source of Mr. Joe Shoen's particular knowledge?

A. I had no reason to do that.

Q. Were you surprised to hear in this courtroom, Mr. Johnson, that Mr. Shoen had gotten some of the knowledge from a tape that was given to him by some anonymous woman several days before?

A. I learned that in this courtroom, yes. I did not know that.

Appendix A

[105] * * *

Q. Were you ever told that a voting trust existed [106] involving three of the defendant directors on July 24th, 1988?

A. I don't know if I knew or not. I tried — basically, I tried to stay away from what the shareholder was doing with the voting trust. I was interested in all the shareholders.

If they had voting trust, they had a right to do that.

Q. Mr. Johnson, if you'd turn to page 43 of your deposition, beginning on line 5.

Question: You attended a Board of Directors' meeting on July 24th; correct?

Right.

You had not been — Question: You had not been told prior to that date that a shareholder agreement existed involving Joe Shoen and some of his siblings?

Answer: No.

And you weren't told at that meeting?

Answer: That didn't come up at that meeting.

Question: And you attended a Board of Directors' meeting on July 25th, 1988; correct?

Answer: Yes.

And you were not told at that meeting that such a shareholder agreement existed?

Answer: Not to my knowledge. That subject never came up. I never asked it, and it never was volunteered.

October 5, 1994, 9:00 a.m.

[88] * * *

Q BY MR. SHAW: Well, in any event, you understood that there was an offer being made or essentially there was, there was a desire to make an offer to you as a plaintiff in this, in this particular situation, Theresa?

A [THERESA SHOEN ROMERO] Yes.

Q And what did you understand that offer to be?

A I would have to give up my, my voting right into a voting trust. It was essentially the same offer that Sophia and Paul have.

They would — I would not be able to vote my stock. It would be in a voting trust, and that would be in exchange for liquidity.

Q And let me ask you this: Did you have any discussions of this offer with anybody else that weekend?

Appendix A

* * *

[89] * * *

Q Do you recall talking to any other director?

A Well, I spoke with Joe.

Q Okay. And did you generally talk about the offer that Mr. Johnson was, was suggesting to you?

A Well, we were generally talking about an offer.

Q Okay. And what did you talk about with Mr. Joe Shoen?

A I asked him if, if an offer came out, would this be available to all shareholders, and he expressly [90] 1 told me that no, he was not going to make an offer to, to my father, L.S., Sam, and Mike.

Q Okay. Once you heard this, what did you think about Mr. Johnson's offer?

A Well, I didn't feel that it was any — that any offer was going to be in good faith after that.

October 6, 1994, 10:05 a.m.

[4] [THE COURT:] We have reached that point in the trial that I have mentioned to you several times, jurors. We are about to give you the closing instructions as well as hear the closing arguments of the lawyers in the case.

Appendix A

* * *

At this time, jurors, I am about to give you the instructions on the law. Each of you should have a [5] copy of the instructions. You should also have a copy of the special verdict form.

* * *

I will now tell you the rules you must follow to decide this case. I will instruct you on the law. It is your duty to follow the law whether you agree with it or not.

[9] * * *

Burden of proof means burden of persuasion. A party who has the burden of proof must persuade you by the evidence that the claim is more probably true than not true. In other words, the evidence supporting a proposition that a party has the burden of proving must outweigh the evidence opposed to it. In determining whether a party has met this burden, you will consider all the evidence, whether produced by plaintiff or defendant.

Some of the claims in this case require proof by clear and convincing evidence.

[10] A party who has the burden of proof by clear and convincing evidence must persuade you by the evidence that the claim is highly probable. This standard is more exacting than the standard of more probably true than not true, but it is less exacting than the standard of proof beyond a reasonable doubt.

Appendix A

You are to use the standard of more probably true than not true for all claims in this case except for those on which you are specifically instructed that the burden of proof is the standard of clear and convincing evidence.

In determining whether a party has met any burden of proof, you will consider all the evidence, whether presented by plaintiff or defendant.

[17] * * *

If you find the director defendant Edward J. Shoen liable to plaintiffs for plaintiffs' breach of fiduciary duty claim, you may consider whether additional damages called exemplary or punitive damages should be awarded to plaintiffs and assessed against defendant Edward J. Shoen. The purpose of punitive damages is to punish the wrongdoer and to deter similar conduct by others. However, such damages cannot be awarded on the basis of plaintiffs' breach of contract claim.

To recover such damages, plaintiffs have the burden of proving by clear and convincing evidence that Edward J. Shoen has been guilty of oppression, fraud, or malice, express or implied. In order to prove oppression, fraud, or malice, express or implied, plaintiffs must prove conduct, which forms the basis of plaintiffs' breach of fiduciary duty claim, motivated by hatred and ill-will and the deliberate and evil intent to injure plaintiffs.

To prove such guilt by clear and convincing evidence, plaintiffs must persuade you that the punitive damages claim is highly probable. This burden of proof is more exacting than the standard of more probably true than not true, which applies to all other claims in this case, but is less exacting than the standard of proof [18] beyond a reasonable doubt.

If you find that the director defendant Edward J. Shoen is liable to plaintiffs for punitive damages, you should determine the amount of punitive damages that should be assessed and enter that amount on your verdict form.

In determining whether [punitive] damages are appropriate, you may consider Edward J. Shoen's reliance upon the advice of counsel in taking the actions challenged by plaintiffs. Such reliance upon the advice of counsel may negate the existence of oppression, fraud, or malice, express or implied, upon which a damage award must be based.

If you find and indicate on your verdict form that punitive damages should be awarded to plaintiffs against the director defendant Edward J. Shoen, then in determining the amount of punitive damages, you may consider the character of Edward J. Shoen's conduct or motive and the extent of harm to plaintiffs that Edward J. Shoen caused, and the nature and extent of his financial wealth.

* * *

[19] You will be given one form of verdict, and it reads as follows. In reading the special form of verdict, I will omit the formal caption. It reads: We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths enter the following special verdict.

Question No. 1: Do you find that the Board of Directors breached a fiduciary duty to plaintiffs?

If your answer is no, do not answer the remaining questions. If your answer is yes, proceed to Question No. 2.

[20] Question No. 2: Do you find that the value of plaintiffs' stock has been diminished as a proximate result of the Board of Directors' breach of fiduciary duty to the plaintiffs?

If your answer is no, do not answer the remaining questions. If your answer is yes, proceed to Question Nos. 3, 4, and 5.

* * *

Question No. 5: Do you find by clear and convincing evidence that defendant Edward J. Shoen has been guilty of oppression, fraud or malice through conduct which forms the basis of a breach of fiduciary duty owed to plaintiffs motivated by hatred and ill-will and the deliberate and evil intent to injure plaintiffs?

If you answer no, do not answer the remaining question. If you answer yes, proceed to Question No. 6.

Question No. 6: State what you have determined to be the amount of punitive damages to be awarded against defendant Edward J. Shoen.

October 7, 1994, 3:30 p.m.

[3] * * *

THE COURT: Good afternoon. The record will show the presence of the jury, counsel, certain plaintiffs. The defendants are not present. It is my understanding that Mr. Fleming waives his presence. Mr. Amoroso waives his presence, and that Mr. Michael Shoen waives his presence.

Ladies and gentlemen of the jury, have you reached a verdict? If so, would the foreperson please stand and answer in the affirmative or negative.

THE FOREMAN: Yes, we have, Your Honor.

THE COURT: Thank you. Would you please hand the special verdict form to the bailiff at this time.

At this time, I would ask that the Clerk of the Court please officially record and read the verdict reached by the jurors in this case.

THE CLERK: We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths enter the following special verdict:

Do you find that the Board of Directors breached a fiduciary duty to plaintiffs?

Yes.

[4] * * *

Do you find by clear and convincing evidence that defendant Edward J. Shoen has been guilty of oppression, fraud or malice through conduct, which forms the basis of a breach of fiduciary duty owed to the plaintiffs, motivated by hatred and ill-will and the deliberate and evil intent to injure plaintiffs?

Yes.

Appendix A

State what you have determined to be the amount of punitive damages to be awarded against defendant Edward J. Shoen.

$70 million.

Daniel J. Apel, Foreperson.

APPENDIX B — DEFENDANT EDWARD J. SHOEN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, FOR REMITTITUR OF PUNITIVE DAMAGES DATED OCTOBER 28, 1994

* * *

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CV 88-20139

SAMUEL W. SHOEN, M.D., et al.,

Plaintiffs,

v.

EDWARD J. SHOEN, et al.,

Defendants.

DEFENDANT EDWARD J. SHOEN'S
MOTION FOR JUDGMENT
NOTWITHSTANDING THE
VERDICT OR, ALTERNATIVELY,
FOR REMITTITUR OF
PUNITIVE DAMAGES

[Assigned to Hon. Thomas Dunevant III]

(Oral Argument Requested)

* * *

Appendix B

[1] Defendant Edward J. Shoen, pursuant to Rule 50(b) of the Arizona Rules of Civil Procedure, moves the Court to enter judgment notwithstanding the verdict on Plaintiffs' punitive damages claim because the record does not contain substantial evidence to establish the "malice in fact" that Nevada law demands before any punitive damages may be awarded. Alternatively, in accordance with Rule 59 of the Arizona Rules of Civil Procedure, Mr. Shoen moves the Court to order a new trial on punitive damages unless Plaintiffs accept a remittitur to reduce the jury's grossly excessive award of $70 million to $1.16 million.

This motion is supported by the following Memorandum of Points and Authorities and by the entire record in this proceeding.

RESPECTFULLY SUBMITTED this 28th day of October, 1994.

SNELL & WILMER

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Appendix B

[2] · *MEMORANDUM OF POINTS AND AUTHORITIES*

I. *INTRODUCTION.*

On September 20, 1994, the Court granted the Director Defendants' Motion for Directed Verdict on punitive damages as to all defendants *except* Edward J. Shoen.[1] Quoting from *Craigo v. Circus-Circus Enter., Inc.*, 106 Nev. 1, 9, 786 P.2d 22, 26-27 (1990), the Court recognized that Nevada law requires a showing on an "evil motive to injure" in order to support a punitive damages award. Because the record was devoid of evidence to establish that the other Director Defendants had acted with the requisite "malice in fact," and because they had acted in reliance on the advice of counsel, the Court held that no punitive damages could be awarded against them as a matter of law. Citing certain separate evidence relating to Edward J. Shoen, however, the Court allowed the jury to consider the punitive damages claim against that Director Defendant. The jurors returned a verdict of $70 million in punitive damages — the exact amount requested by Plaintiffs' counsel in closing argument.

A Motion for Judgment Notwithstanding the Verdict is a renewal of a motion for a directed verdict, and " 'is designed to permit the trial court, after more mature deliberation, to reverse its ruling in denying the motion for an instructed verdict.' " *McGuire v. Caterpillar Tractor Co.*, 151 Ariz. 420, 423, 728 P.2d 290, 293 (Ct. App. 1986), quoting *In re Schade's Estate*, 87 Ariz. 341, 348, 351 P.2d 173, 178 (1960). This is a case that compels the application of that precept. With "more

1. The Motion for Directed Verdict was granted as to Aubrey K. Johnson, William E. Carty, John M. Dodds, James P. Shoen and Paul F. Shoen.

mature deliberation" comes the recognition that Plaintiffs have not adduced substantial evidence — much less "clear and convincing evidence" — upon which a reasonably jury should have concluded that Edward J. Shoen acted with "malice in fact" in taking the actions that constituted the alleged breaches of fiduciary duty.

In the alternative, the Court must, in accord with Nevada's punitive damages procedure and fundamental principles of due process, reduce the jury's grossly excessive award of $70 [3] million. Nevada law does not permit punitive damage awards that are so large that they threaten to financially annihilate the defendant. "Punitive damages are intended to punish, not to destroy." *S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 107 Nev. 294, 299, 810 P.2d 775, 778 (1991). The jury's award — which is more than *11 times larger* than the largest punitive damages award the Nevada Supreme Court has *ever* upheld — clearly crosses the line into forbidden territory. In order to bring the punitive damages awarded into conformance wiht Nevada law, a reduction of the award to $1.16 million is mandated.

II. *JUDGMENT NOV SHOULD BE ENTERED FOR EDWARD J. SHOEN ON PUNITIVE DAMAGES BECAUSE THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH THE REQUISITE MALICE IN FACT.*

The test for granting a motion for judgment notwithstanding the verdict is the same as that governing the direction of a verdict during trial. *Piper v. Bear Medical Sys., Inc.*, 1993 WL 471120 at *2 (Ariz. Ct. App. 1993); *Times Mirror Co. v. Sisk*, 122 Ariz. 174, 178, 593 P.2d 924, 928 (Ct. App. 1978). The Court should thus grant judgment nov where "the facts

produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *Schuck v. Texaco Refining & Marketing*, 178 Ariz. 295, 872 P.2d 1247 (Ct. App. 1994); *Piper v. Bear Medical Sys., Inc., supra.*

Here, Plaintiffs were required to prove that Edward J. Shoen acted with "oppression, fraud or malice" in taking the actions that constituted the alleged breaches of fiduciary duty. Nev. Rev. Stat. § 42.005(1). "Oppression, fraud or malice" are essentially synonymous concepts – or "birds of a feather," as the Nevada courts put it. *Craigo v. Circus-Circus Enter., Inc., supra*, 106 Nev. at 7, 786 P.2d at 25. Under Nevada law, the defendant must have acted with "malice in fact" – that is, he must have had "evil motive to injure" before punitive damages can be awarded. As the Nevada Supreme Court admonished:

> [4] [I]t is this court's intention *to restrict awards of punitive damages* attributable to malice in fact *to those extreme cases that convincingly demonstrate conduct motivated by hatred and ill-will and the deliberate intent to injure.*

Craigo v. Circus-Circus Enter., Inc., supra, 106 Nev. at 9, 786 P.2d at 26 (emphasis supplied).

Moreover, this "evil motive to injure" must be proven "by clear and convincing evidence." Nev. Rev. Stat. § 42.005(1). "To be clear and convincing, evidence 'need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn.' " *In re Stuhff*, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992).

Finally, unless the evidence of an "evil motive to injure" is *substantial*, as well as clear and convincing, any award of punitive damages must be set aside. The Nevada Supreme Court has proclaimed that "[a]n award of punitive damages may not stand where the record lacks substantial evidence to support the required finding of 'oppression, fraud or malice, express or implied.' " *First Interstate Bank of Nevada v. Jafbros Auto Body, Inc.*, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990). In this case, the Court reversed an award of punitive damages despite the fact that the evidence supported an inference the defendant was negligent to the point of being unconscionably irresponsible. "Yet, *without substantial evidence of oppression, fraud or malice, even unconscionable irresponsibility will not support a punitive damages award.*" *Id.* at 57, 787 P.2d at 767 (emphasis supplied). Nevada's high court similarly reversed an award of punitive damages in *Craigo v. Circus-Circus Enter., Inc.*, *supra*, because the court did "not perceive evidence of any intent by Circus-Circus to deliberately harm its patrons." 106 Nev. at 10, 786 P.2d 22, 28.

As shown below, the record in this case is devoid of substantial, clear and convincing evidence to prove that Edward J. Shoen acted with an "evil motive to injure." The award of punitive damages therefore simply cannot stand.

[5] A. *Edward J. Shoen Took The Identical Actions As The Other Director Defendants, Who Were Held Not To Be Liable For Punitive Damages.*

The nucleus of Plaintiffs' claims of breach of fiduciary duty is the actions taken by the AMERCO Board of Directors in July of 1988 — the issuance of the key employee stock, the establishment of the ESOP, and related acts. Those actions were

taken collectively by Messrs. Johnson, Carty, Dodds, Paul F. Shoen, James P. Shoen and Edward J. Shoen — the six members of the Board of Directors. Each member of the Board approved each of the relevant actions. This Court ruled that Plaintiffs had not adduced sufficient evidence to state a claim for punitive damages as to any of those Directors — *except* Edward J. Shoen. Although Edward J. Shoen, acting as a member of the Board, bears responsibility for each of the actions, none of the claimed breaches of fiduciary duty was taken by Edward J. Shoen acting alone. Thus, it is wholly illogical to conclude that Edward J. Shoen was acting with an "evil motive to injure" when he took the *identical* actions that the other Directors took — actions that, as a matter of law, did not allow the other Directors to be subjected to punitive damages.

This unreasonable disparity in the treatment of Edward J. Shoen is particularly evident in view of the fact that *all* members of the Board of Directors acted upon the samee advice of counsel. The rule is well established that where a defendant acts in good faith reliance on the advice of counsel, punitive damages will not lie. *See, e.g., Morgan Guaranty Trust Co. v. American Sav. & Loan Ass'n*, 804 F.2d 1487, 1500 (9th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987) (punitive damages not recoverable against party who acts in good faith under advice of counsel); *Angell v. Leslie*, 832 F.2d 817, 821 (4th Cir. 1987) ("[W]hether the action of the individual defendant Leslie was correct or not, he acted at all times under the advice of the duly selected city anorney. This contradicts entirely any basis for a recovery of punitive damages. . . .") (footnote omitted); *Sheridan Comm. Park, Inc. v. Briggs*, 848 P.2d 811 (Wyo. 1993) (reversing award of punitive damages); *Brearden v. John Hancock Mutual Life* [16] *Ins. Co.*, 70SF. Supp. 1196

a). Kan. 1987) (granting summary judgment for defendant on punitive damages).

It strains credulity to postulate that in taking the actions of July, 1983, five of the Directors acted in good faith reliance upon counsel's advice while the sixth Director, having heard exactly the same advice and taken exactly the sane actions, did so with "malice in fact." There was no evidence that Edward J. Shoen attempted to influence the other Directors improperly or that Edward J. Shoen's reliance upon the advice of AMERCO's legal counsel was not in good faith. In fact, the lawyer who advised the AMERCO Board of Directors in July of 1988, testified that Joe Shoen did not even take an active role in those Board meetings. (9/20/94 Tr. (Morning Session) at pp.55-56. (Pages attached as Exhibit "A" hereto.)) Absent *substantial* and *clear and convincing* evidence that in taking the actions alleged to be breaches of fiduciary duty Edward J. Shoen acted with an "evil motive to injure," the award of punitive e damages must be set aside.

B. *The Separate "Evidence" Relied Upon Is Too Remote In Time And Is Wholly Unconnected With The Acts Giving Rise To Liability And Thus Cannot Support An Award of Punitive Damages As To Edward J. Shoen.*

In denying the Motion for Directed Verdict as to Edward J. Shoen, the Court identified certain evidence that supposedly differentiated that Director from the rest of the Board members. The evidence cited, however, is equally insufficient to support an award of punitive damages. Not only is it generally too remote in time from the Board of Directors' actions of July, 1988, but, more importantly, it is simply *not* clear and convincing evidence that Edward J. Shoen acted with the requisite "evil motive to injure" in taking those actions.

Appendix B

The so-called "heir apparent" letter from Joe Shoen to L.S. Shoen was written in October of *1982*, almost *six years* before the events at issue. (Trial Exhibit No.13.) Joe's mental state in July of 1988 cannot be inferred from evidence that is so far removed in time from the pertinent events. For example, in *Campbell v. Bartlett*, 975 F.2d 1569, 1582-83 [7] (10th Cir. 1992), the Tenth Circuit upheld a directed verdict for the employer on the issue of punitive damages where the supporting evidence — information in the employee-driver's personnel file — was too remote in time from and was unconnected with the accident at issue. *See also Gulbranson v. Duluth, Missabe & Iron Range Railway Co.*, 921 F.2d 139,142 (8th Cir. 1990) (meeting minutes taken *eight months* after the pertinent event irrelevant to show defendant's knowledge at time of accident).

Even more significant is the content of the "heir apparent" letter itself. In that letter, Joe Shoen says things such as "You have my never ending respect as my father, as a great organizational talent." (Trial Exhibit 13 at 1.) That is hardly the stuff of which evil motives are made.

The other letter referenced by the Court involved Joe Shoen's concern over the fact that his children, then aged 9 and 11, were being served with process. That May 12, 1989 letter (Trial Exhibit 221), however, was written by Stephen S. Case, 1121 by Joe Shoen. Moreover, the Court refused to admit the letter into evidence on the grounds it was hearsay. (9/14/94 Tr. (Afternoon Session) at p.49 lines 4-5. (Page attached as Exhibit "B" hereto.)) In addition, that letter concerned events that transpired 10 months *after*, and were wholly unrelated to, the Board's actions of July, 1988. Mr. Case even testified that his statement in the letter that Joe Shoen "would make life as

difficult as possible" was an exaggeration. All that Mr. Case was referring to by the term "life" was the stock registration transaction then at issue. (9/14/94 Tr. (Afternoon Session) at pp.44-45 (Pages attached as Exhibit "C" hereto.)) Mr. Case was not alluding to any of the events of July, 1988, in his letter. In sum, nothing in Mr. Case's letter constitutes substantial, clear and convincing evidence that could justify an award of punitive damages against Joe Shoen.

The Court also cited to Edward J. Shoen's speech and conduct in relation to L.S. and Sam Shoen in denying the directed verdict on punitive damages. Once again, however, the record is simply devoid of the quantum of clear and convincing evidence that is necessary to [8] prove that Joe Shoen acted with an "evil motive to injure." Admittedly, relations among the various Shoen family members are not harmonious. Over the years, family relationships have been characterized by a series of shifting alliances and factions. Indeed, there is evidence in the record of altercations among the Plaintiffs themselves. *See, e.g.*, punching incident between Mike Shoen and Sam Shoen. (9/7/94 Tr. (Morning Session) at pp.34-35. (Pages attached as Exhibit "D" hereto.)) *This general lack of harmony, however, does not translate into the requisite "evil motive to injure" with respect to the actions taken by Edward J. Shoen and the other Directors in July of 1988.* It is not enough simply to show that Joe Shoen did not get along with his father or some of his siblings as a general matter. Family disputes do not constitute torts. what Nevada's concept of malice in fact requires is that Plaintiffs prove, by substantial, clear and convincing evidence, that this Director Defendant was motivated by an evil intent to injure *in taking the actions that constitute the alleged breaches of fiduciary duty.*

Appendix B

The only speech or conduct by Edwards. Shoen concerning L.S. or Sam Shoen that took place at about the time of the July, 1988 AMERCO Board actions was the incident at a shareholders' advisory committee meeting on July 16, 1988, in which Joe Shoen looked at Sam's notes and exclaimed that Sam was going to sell the company. (8/31/94 Tr. (Afternoon Session) at pp. 29-31. (Pages attached as Exhibit "E" hereto.)) What this evidence demonstrates is that Joe Shoen had a very good basis for believing that there was a threat to the company m July of 1988, and that he and the other Directors were fully justified in relying on the advice of AMERCO's counsel and taking certain of the actions that counsel had recommended to protect the company. In short, the evidence shows that Edward S. Shoen was motivated by a desire to protect AMERCO, *not* by an evil motive to harm Plaintiffs.

The fact is that *all* of the disagreements between Joe Shoen and his father and brothers invariably concerned business disputes — *i.e.*, differences of opinion about how the business of AMERCO should be conducted. Those disputes centered on contrasting business [9] philosophies — *not* personalities. Certainly, one may disagree about how to operate a business without being subjected to liability for punitive damages.

The absence of substantial, clear and convincing evidence of malice in fact that is directly related to Joe Shoen's actions as a member of the Board of Directors in July, 1988, requires the Court to enter judgment nov for Edward J. Shoen on the issue of punitive damages.

III. *ALTERNATIVELY, THE COURT SHOULD ORDER A REMITTITUR BECAUSE THE $70 MILLION PUNITIVE DAMAGE AWARD IS SO ENORMOUS AS TO FINANCIALLY ANNIHILATE MR. SHOEN.*

As explained above, no award of punitive damages can be justified under Nevada law. If the Court declines to grant the Rule 50(b) Motion, however, the procedures and guidelines established by the Nevada Supreme Court with respect to punitive damages require this Court to review the jury's $70 million award and reduce it significantly. The amount of the award is so enormous as to threaten Edward J. Shoen with financial annihilation, for his entire net worth is only an estimated $47,624,086. (*See* Affidavit of Edward 3. Shoen, attached hereto as Exhibit "F.") That result is clearly forbidden under Nevada law; however, such financial destruction was obviously the *purpose* behind Plaintiffs' counsel suggesting such an award to the jury in closing argument. (*See* 10/6/94 Tr. (Morning Session) at pp. 104-05. (Pages attached as Exhibit "G." hereto.)) The jury's $70 million award of punitive damages cannot stand. The Court should order a remittitur to reduce the award to $1.16 million.

Nevada courts routinely review and significantly reduce punitive damage awards, large and small alike.[2] *E.g.*, *Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824 (1962) (reducing award from $50,000 to $5,000); *Rcnublic Ins Co V Hires*, 107 Nev. 317, 810 P.2d 790 (1991) (reducing award from $22,500,000 to $5,000,000); *Leslie v. Jones Chemical Co.. Inc.*, 92 Nev. 391, 551 P.2d 234(1976); *Kellar v. Brown*, 101 Nev. 273, 701 P.2d 359 (1985); *Ace [10] Truck & Equip. Rentals, Inc. v. Kahn*,

2. No Nevada case has been found in which either the trial court or the Supreme Court has increased the amount of punitive damages.

103 Nev. 503, 746 P.2d 132 (1987); *S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 107 Nev. 294, 810 P.2d 775 (1991). In two other cases, the Supreme Court has remanded with instructions that the trial court reconsider the amount of punitive damages in view of the special circumstances of the defendant or because the compensatory damages had to be recalculated. *See Gidney V. Merrian*, 98 Nev. 54, 639 P.2d 536 (1982) (fact that defendant was in receivership required reconsideration of amount of punitive damages), and *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 514 P.2d 1180 (1973).

Whether punitive damages are excessive is to be evaluated in accordance with the following Nevada Supreme Court standard:

> Punitive damages are legally excessive *when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor* under the circumstances of a given case.

Ace Truck & Equip. Rentals, Inc. v. Kahn, 103 Nev. 503, 509, 746 P.2d 132, 136-37 (1987) (emphasis supplied). Where "the awarding judge or jury assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, *then the award must be set aside as excessive.*" *Id.* at 509, 746 P.2d at 137 (emphasis supplied).

The specific criteria that must guide this post-verdict evaluation of punitive damage awards for excessiveness were also spelled out in *Ace Truck & Equip. Rentals* by the Nevada

high court. "*Relevant circumstances include such matters as the financial position of the defendant*, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind." Id. at 510, 746 P.2d at 137 (emphasis supplied).

That Nevada attaches great significance to the financial position of the defendant in assessing punitive damages is apparent from the case law. For example, in the seminal *Ace* [11] *Truck & Equip. Rentals* decision, the Court slashed the awards against both defendants as justified neither as punishment nor as deterrence. A large factor in that reduction was the defendants' net worth: "this is particularly true in view of the fact that (the defendants'] proven net assets of $1,626,000.00 and $705,700.00 will be substantially reduced by payment of compensatory damages to the plaintiffs." *Id.* at 511, 746 P.2d at 138. Similarly, the Court in *Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824 (1962), reduced the punitives to one-tenth of what the jury had awarded after considering the defendant's net worth. "In our judgment one may be punished without being destroyed. *The public interest is not served by the [defendant's] financial annihilation.*" *Id.* at 311, 371 P.2d at 829.

More recently, in *S.J. Amoroso Constr. Co. V. Lazovich & Lazovich*, 107 Nev. 294, 298, 810 P.2d 775, 778 (1991), the Court reduced $1 million in punitive damages by 50 percent because the jury's award would have cut the defendant's net worth of $3 million by one-third. The Court explained that "[p]unitive damages are intended to punish. not destroy." *Id.*

(emphasis supplied). The defendant's net worth was also a prime factor in the sharp reduction of a $22.5 million award of punitive damages in *Republic Ins. Co. v. Hires*, 107 Nev. 317, 810 P.2d 790 (1991). In view of the insurance company defendant's $172 million net worth, the Supreme Court concluded that any punitive award in excess of $5 million "would be unreasonable and disproportionate to the behavior of [the defendant]." *Id.* at 321, 810 P.2d at 793.

Even where the Nevada Supreme Court has upheld the size of a punitive damages award, it has made clear that the relationship between the defendant's net worth and the amount of the punitives was a key factor in that result. In *Ainsworth V. Combined Ins. Co.*, 104 Nev. 587, 593-94, 763 P.2d 673, 677 (1988), the Court approved an award of $5,939,500 in punitive damages where that amount equalled only *four-tenths of one percent* of the defendant's total net worth and *5 percent* of one year's net operating gain. *See also Hale v. Riverboat Casino, Inc.*, 100 Nev. 299, 682 P.2d 190 (1984) (punitives of $97,900 upheld where amount [12] represented .5 percent of defendant's net worth); *Midwest Suoply. Inc. V. Waters*, 89 Nev. 210, 510 P.2d 876 (1973) (punitives of $100,000 upheld where defendant's net worth was $6 million).

The nearly $6 million award upheld in *Ainsworth* is the largest punitive damages award that has been approved *in any reported Nevada Supreme Court decision.* The jury's award of $70 million in punitive damages against Edward J. Shoen is *more than 11 times larger than that.* The excessiveness of the award here under the standard articulated in *Ace Truck & Equip. Rentals, supra*, is apparent when the award is compared to the defendant's net worth. As is evident from Exhibit "F," Mr. Shoen's net worth of $47,624,086 would be completely

annihillated by an assessment of punitive damages of $70 million, leaving a deficiency of in excess of $22 million. That, of course, is precisely the result intended by Plaintiffs. In Mr. Shaw's closing argument, he told the jury that, assuming a value for AMERCO stock of $20 per share, Edward J. Shoen's stock was worth $70 million. Mr. Shaw then suggested that an award of $10 million in punitive damages for each of the seven Plaintiffs would be appropriate. (*See* 10/6/94 Tr. (Morning Session) at pp.104-05. (Pages attached as Exhibit "G" hereto.)) That is just the verdict the jury returned.

Clearly, the jury's award is far more "than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct." *Ace Truck & Eguip. Rentals, supra.* Under Nevada law, the award must be set aside as excessive. Applying the ratios of punitive damages to net worth that have been approved in Nevada Supreme Court cases, the $70 million award would be reduced to approximately $190,000 under *Ainsworth*, to approximately $1.38 million under *Republic Ins. Co. v. Hires*, to approximately $795,000 under *Midwest Supply, Inc. v. Waters*, and to approximately $238,000 under *Hale v. Riverboat Casino. Inc.* While the various ratios applied in those eases produce a fairly wide range of results, none of those results comes anywhere close to the jury's plainly excessive [13] figure of $70 million.[3]

3. This is particularly true when one considers that the vast majority of Edward J. Shoen's net worth is not liquid. *See* Exhibit "F." The suggested reduction of the jury's punitive damages award to $1.16 million represents 2.44 percent of Edward J. Shoen's net worth. Thus, the award would fall roughly halfway between the *Midwest Supply* (1.67 percent of net worth) and *Republic Ins.* (2.9 percent of net worth) standards for post-verdict reductions. However, if Mr. Shoen's illiquid AMERCO stock is disregarded, this suggested punitive damages award exceeds his entire remaining net worth.

Considering the factors used by the Nevada Supreme Court in evaluating the excessiveness of punitive damage awards, any award here of more than $1.16 million cannot be justified either as punishment or as deterrence. "The public interest is not served by the [defendant's] financial annihilation." *Miller v. Schnitzer, supra*, 78 Nev at 311, 371 P.2d at 829.

The Court should therefore order a new trial on the issue of punitive damages under Rule 59(i) of the Arizona Rules of Civil Procedure unless Plaintiffs agree to accept a reduction of punitive damages to $1.16 million.

IV. *JUDICIAL SCRUTINY OF THE AMOUNT OF PUNITIVE DAMAGE AWARDS IS REQUIRED IN ORDER TO SATISFY DUE PROCESS.*

As is apparent from the cases discussed in Section m, the Nevada courts conduct a thorough post-verdict review of punitive damage awards to evaluate excessiveness. Moreover, those courts do not hesitate to reduce punitive damages when they are found to be unreasonable and disproportionate. This procedure is not merely a peculiarity of Nevada law — it is required to comport with federal and state constitutional concepts of due process. In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21(1991), the United States Supreme Court upheld Alabama's punitive damages procedure against a due process attack because, *inter alia*, the Alabama courts conducted a post-verdict review of punitive damages "to ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' " This is precisely the goal of Nevada's post-verdict review.

A failure to review the jury's $70 million award here and to reduce that award to an amount that does not exceed what

is necessary to accomplish the purposes for which punitive [14] damages are assessed would work a violation of Edward 3. Shoen's due process rights under the Arizona and federal constitutions.

V. *CONCLUSION.*

Plaintiffs have not adduced substantial, clear and convincing evidence to demonstrate that Edward J. Shoen acted with an 'evil motive to injure" in tkdng, along with the other members of the Board of Directors, the actions in July of 1988, that are at the core of Plaintiffs' breach of fiduciary duty claim. Therefore, no award of punitive damages can be justified under Nevada law and judgment notwithstanding the verdict should be entered for Mr. Shoen.

Alternatively, if the Court concludes that some amount of punitive damages can be justified, the $70 million awarded by the jury is excessive and must be set aside. Considering Edward J. Shoen's net worth and the other factors deemed appropriate under Nevada law, the Court should order a new trial on punitive damages unless Plaintiffs accept a remittitur to reduce the award to $1.16 million.

RESPECTFULLY SUBMMITTED this 28th day of October, 1994.

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Appendix B

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APPENDIX C — APPELLANT'S OPENING BRIEF DATED NOVEMBER 20, 1996

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CV 95-0199

SAMUEL W. SHOEN, M.D.; MARY ANNA SHOEN-EATON; CECILIA M. SHOEN-HANLON; THERESA SHOEN-ROMERO; MICHAEL L. SHOEN; LEONARD S. SHOEN; and the following Arizona corporations: SAMWILL, INC.; CERMAR, INC.; KATTYDID, INC.; THERMAR, INC.; MICKL, INC.; MARAN, INC., and L.S.S., INC.,

Plaintiffs/Appellees/Cross-Appellants,

v.

EDWARD J. SHOEN,

Defendant/Appellant/Cross-Appellee.

Maricopa County Superior
Court No. 88-20139

APPELLANT'S OPENING BRIEF

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Appendix C

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* * * *

[1] *STATEMENT OF THE CASE*

This is the second time that this litigation, which mvolves a struggle for the control of AMERCO, a Nevada Corporation, has been before this Court. In *Shoen v. Shoen*, 167 Ariz. 58, 804 P.2d 787 (Ct. App. 1990), this Court affirmed the denial of a preliminary injunction sought by certain Dissident Shareholders, who are Plaintiffs/Appellees/Cross-Appellants here[1], that would have canceled the July 1988 issuance of certain AMERCO voting stock to key employees. (A copy of *Shoen v. Shoen* is included in Appellant's Appendix as Exhibit 1.) Following that decision and the Supreme Court's denial of review, the litigation proceeded in the trial court.

By the time of trial, the only claims that remained of the Fourth Amended Complaint (C.I. 684[2] were (1) the claim that actions

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1. The Dissident Shareholders include Samuel W. Shoen, Mary Anna Shoen-Eaton, Cecilia M. Shoen-Hanlon, Katrina M. Shoen-Carlson, Theresa Shoen-Romero, Michael L. Shoen and Leonard S. Shoen, as well as their personal corporations, including Samwill, Inc., Cermar, Inc., Kattydid, Inc., Thermar, Micki, Inc. Mann, Inc. and L.S.S., Inc.

2. References to "C.I." are to the Superior Court Clerk's Index of the record on appeal.

taken by the Director Defendants[3] in July of 1988, including the establisliment of the Employee Stock Ownership Plan ("ESOP"), the issuance of the key employee stock and related acts, had breached a fiduciary duty to the Dissident Shareholders by enhancing and entrenching the power of the incumbent management, and (2) the claim that certain actions taken by the Director Defendants in July of 1989 had breached a settlement agreement with the Dissident Shareholders. The Dissident Shareholders sought [2] compensatory damages for the latter claim and both compensatory and punitive damages as to the former.

Trial began before the Honorable Thomas Dunevant, III, on August 22, 1994. (C.I. 1131.) On September 20, 1994, the trial coun granted a directed verdict on punitive damages as to all of the Director Defendants *except* Defendant/Appellant/Cross-Appellee Edward J. Shoen. (9/20/94 a.m. Tr. at pp.4-16 (Exhibit 2 to Appellant's Appendix).) The Dissident Shareholders have never challenged the grant of a directed verdict on punitive damages as to the other Director Defendants.

On October 6, 1994, the jury was instructed on the claim that actions taken by the AMERCO Board of Directors had breached its fiduciary duty to the Dissident Shareholders. (C.I. 1179 at pp. 12-23 (Exhibit 3 to Appellant's Appendix); 10/6/94 a.m. Tr. at pp.10-14.) The verdict form asked the jury

> *Question No.1*: Do you find that the Board of Directors breached a fiduciary duty to the plaintiffs?
>
> ☐ Yes ☐ No

3. The Director Defendants remaining in the litigation at the time of trial were Edward J. Shoen, James P. Shoen, Aubrey K. Johnson, William E. Carty, John M. Dodds and Paul F. Shoen.

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(C.I. 1177 (Exhibit 4 to Appellant's Appendix).)

The jury was further instructed on the Dissident Shareholders' claim for punitive damages as to Director Defendant Edward J. Shoen. (C.I. 1179 at pp. 32-34 (Exhibit 3 to Appellant's Appendix); 10/6/94 a.m. Tr. at pp.17-18.) With respect to punitive damages, the verdict form asked the jury, if it found a breach of fiduciary duty and damages proximately resulting therefrom:

> Question No. 5: *Do you fmd by clear and convincing evidence that defendant Edward J. Shoen has been guilty of oppression, fraud or malice through conduct, which forms the basis of a breach of [2] fiduciary duty owed to the plaintiffs, motivated by hatred and ill-will and the deliberate and evil intent to injure plaintiffs?*
>
> ❒ Yes ❒ No

(C.I. 1177 (Exhibit 4 to Appellant's Appendix)).

On October 7, 1994, the jury returned its verdict, finding that the Director Defendants had breached a fiduciary duty to the Dissident Shareholders, fixing the per share value of AMERCO stock before and after the bteach and awarding punitive damages against Edward J. Shoen in the amount of $70 million.[4] (C.J. 1177 (Exhibit 4 to Appellant's Appendix).)

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4. The trial court had instructed the jury that the Director Defendants' July 14, 1989 actions in causing 4,760 shares of key employee stock to be transferred to the AMERCO ESOP constituted a breach of the September 3, 1988 settlement agreement with the Dissident Shareholders. The jury was further instructed to determine what damages, if any, flowed from that breach of contract. (10/6/94 Tr. at p. 15; C.I. 1179 at p.28 (Exhibh 3 to Appellant's Appendix).)

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With respect to the award of compensatory damages, as a result of rulings on various post-trial motions filed by the Director Defendants and the Dissident Shareholders' acceptance of a remittitur, the court entered judgment on February 21, 1995, ordering that the Dissident Shareholders be paid the sum of $461,838,000[5] in exchange for transferring all of their shares of AMERCO stock to the Director Defendants. (C.I. 1236.) No party appealed from that judgment.

As for the award of punitive damages, Edward J. Shoen filed a motion for judgment notwithstanding the verdict or, alternatively, for remittitur or a new trial on the issue of punitive damages; the Dissident Shareholders opposed that motion, which was heard on [4] December 16, 1994. (C.I. 1190, 1192, 1209, 1213, 1216, 1224 (Exhibits 5-7 to Appellant's Appendix).) On February 2, 1995, the trial court denied the motion for judgment notwithstanding the verdict and ordered a new trial on punitive damages unless the Dissident Shareholders agreed to accept a remittitur decreasing the award of punitive damages from $70,000,000 to $7,000,000. (C.I. 1227 (Exhibit 8 to Appellant's Appendix).) The Dissident Shareholders accepted that remittitur (C.I. 1228, 1229 (Exhibits 9-10 to Appellant's Appendix)) and judgment against Edward J. Shoen for punitive damages in the amount of $7,000,000 was entered on February 21, 1995. (C.I. 1235 (Exhibit 11 to Appellant's Appendix).) Edward J. Shoen timely filed a Notice of Appeal from that judgment on March 23, 1995. (C.I. 1240 (Exhibit 12 to Appellant's Appendix).) On April 12, 1995, the Dissident Shareholders filed a Notice of Cross-Appeal from the judgment remitting the punitive damages award to $7,000,000. (C.I. 1247.)

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5. The Dissident Shareholders' claims for that sum were subsequently paid in full and discharged in the bankruptcy proceedings discussed *infra*.

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On May 23 1995, Appellant Edward J. Shoen notified this Court that he had filed a Petition in the United States Bankruptcy Court for the District of Arizona, captioned *In re Edward J. Shoen*, Case No 95 1430-PHX-JMM, requesting relief under Chapter 11 of the United States Code; he invoked the automatic stay provided by Bankruptcy Code § 362(a). By Order dated May 31, 1995 this Court stayed this appeal until further order. On October 15, 1996, Edward J. Shoen notified this Court that on October 1, 1996, the parties to the bankruptcy proceeding had filed with the Bankruptcy Court a notice that the effective date of Edward J. Shoen's Plan of Reorganization had occurred and that the confirmed Plan, pursuant to which the Dissident Shareholders[6] were paid in full. had been performed and was substantially consummated, thereby terminating the automatic stay.

[5] The Dissident Shareholders filed claims as creditors in Edward J. Shoen's bankruptcy proceeding with respect to the $7,000,000 judgment for punitive damages created by the February 21, 1995 judgment. (*See* Plan of Reorganization, included in Exhibit "1" to Edward J. Shoen's "Status Report Regarding Appellant's Bankruptcy Proceeding," filed with this Court on April 5, 1996.) The Plan sets forth the terms under which the punitive damages awarded in the February 21, 1995 judgment will be paid if that judgment is sustained on appeal.

This Court has jurisdiction of this appeal pursuant to A.R.S. § 12-2101(B).

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6. Dissident Shareholder Mary Anna Shoen-Eaton and her corporation, Mann, Inc., have settled their claim against Edward 3. Shoen with respect to the punitive damage award. Exhibit "1" to April 5, 1996 Status Report to this Court. Due to that settlement, the amount of punitive damages at issue in this appeal is $6,000,000. Henceforth in this Brief, the term "Dissident Shareholders" will not include Mary Anna Shoen-Eaton or Maran, Inc.

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[6] *STATEMENT OF FACTS*

* * * *

[13] *STATEMENT OF THE ISSUE PRESENTED FOR REVIEW*

Did the trial court err as a matter of law in refusing to set aside an award of punitive damages against Director Edward J. Shoen because there was insufficient evidence to establish the requisite malice in fact under Nevada law, particularly where the court had directed a verdict on punitive damages for the other Director Defendants, all of whom had taken the identical action that resulted in the jury's finding of liability?

[14] *ARGUMENT*

I. *INTRODUCTION*

This appeal presents a novel question — whether, as a matter of law, punitive damages may be assessed against one member of a board of directors for taking the identical actions taken by the remainder of the board when the trial court has ruled that, as a matter of law, there was insufficient evidence of an "evil motive to injure" to warrant submission to the jury of the punitive damages claim as to the other Director Defendants. The invalidity of the jury's punitive damages award against Edward J. ("Joe") Shoen under these circumstances is particularly manifest when one considers that all of the directors, *including* Joe Shoen, were acting on the advice of counsel in taking the actions they did. Although the jury did not find that reliance to be a defense to liability for breach of fiduciary duty, reliance on counsel's advice speaks volumes on the issue of mental state that is so critical in determining whether punitive damages may be awarded. Moreover, the

assessment of punitive damages against Joe Shoen due to his role in the actions taken by the Board of Directors was particularly groundless because Joe Shoen's vote was not even necessary for any of the Board's actions.

Nevada law, which governs this case, requires both *substantial* and *clear and convincing* evidence of "malice in fact" to jusufy punitive damages. Neither was present here. Moreover, because the only evidence the trial court could cite to justify its disparate treatinent of Joe Shoen was either too remote in time or unconnected with the events that gave rise to the liability for which punitive damages were imposed, there was no causal link between the breach of fiduciary duty and the award of punitive damages. In other words, the jury punished Joe Shoen [15] based on a history of troubled relationships among various members of the Shoen family, *not* because there was any evidence that in taking the same actions as the other directors during July of 1988, Joe Shoen, and he alone, had acted with "malice in fact" or an "evil motive to injure."

The absence of any foundation for an award of punitive damages under Nevada's standards requires that the jury's verdict assessing punitive damages against Joe Shoen be set aside as a matter of law.

II. *STANDARD OF REVIEW*

The standard for granting a motion for judgment notwithstandmg the verdict is the same as the standard for directing a verdict and for granting summary judgment. *Piper v. Bear Medical Sys. Inc*, 180 Ariz 170, 173, 883 P.2d 407, 410 (Ct. App. 1993); *Orme School v. Reeves*, 166 Ariz 301, 309, 802 P.2d 1000, 1008 (1990). Any of these motions should be granted if the facts

produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense *Orme School*, *supra*.

On appeal, the grant or denial of a motion for judgment nov, just like a motion for summary judgment or directed verdict, is reviewed *de novo*, viewmg the evidence ifi the light most favorable to the party opposing the motion. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992), *cert. denied*, 510 U 5932 (1993); *Piper*, *supra*; *Riley. Hoggatt & Suagee. P.C. v. English*, 177 Ariz. 10, 12, 864 P 2d 1042, 1044 (1993).

[16]III THE TRIAL COURT ERRED IN DENYING JUDGMENT N.O.V. ON PUNITIVE DAMAGES BECAUSE THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH THE REQUISITE MALICE IN FACT

When the meager evidence of Joe Shoen's motive with respect to the actions taken by the Board of Directors in July of 1988, is assessed *de novo* in light of the stringent Nevada requirements for punitive damages, it is plain that there was not substantial, clear and convincing evidence to support any award of punitive damages. The trial court therefore erred as a matter of law in failing to grant Joe Shoen's motion for judgment notwithstanding the verdict.

A. The Nevada Standard For Punitive Damages Demands Substantial And Clear And Convincing Evidence Of A Defendant's "Evil Motive To Injure"

The parties agreed that this litigation was governed by the substantive law of Nevada and the trial court duly applied Nevada's

law of punitive damages in ruling on the directed verdict motion and the motion for judgment notwithstanding the verdict. (9/20/94 a.m. Tr. at pp. 4-16 (Exhibit 2 to Appellant's Appendix); C.I. 1227 (Exhibit 8 to Appellant's Appendix).)

Nevada law required the Dissident Shareholders to prove that Edward J. Shoen acted with "oppression, fraud or malice" in taking the actions that constituted the alleged breaches of fiduciary duty. Nev. Rev. Stat. § 42.005(1).[7] "Oppression, fraud or malice" are essentially synonymous concepts — or "birds of a feather," as the Nevada courts put it *Craigo v. Circus- Circus Enter. Inc.*, 106 Nev. 1, 7, 786 P.2d 22, 25 (1990). Under Nevada law the defendant [17] must have acted with "malice in fact" — that is, he must have had an "evil motive to injure" before punitive damages can be awarded. As the Nevada Supreme Court admonished:

> [I]t is this court's intention *to restrict awards of punitive damages* attributable to malice in fact *to those extreme cases that convincingly demonstrate conduct motivated by hatred and ill-will and the deliberate intent to injure.*

Craigo v. Circus-Circus Enter. Inc., 106 Nev. at 9, 786 P.2d at 26 (emphasis supplied). Significantly, the Court "disapprove[d] our prior pronouncements that would indicate that malice in fact can be shown by a willful disregard of the rights of others or a conscious disregard of safety measures *unless it can be shown that in*

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7. "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant." Nev. Rev. Stat. § 42.005(1).

connection therewith there was a deliberate intention to injure. vex. annov or harass." *Id.* at 9, 786 P.2d at 27 (emphasis supplied).

Moreover, this "evil motive to injure" must be proven "by clear and convincing evidence." Nev. Rev. Stat. § 42.005(1).[8] "To be clear and convincing, evidence 'need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference ... may be drawn.' " *In re Stuhff*, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992).

In addition, unless the evidence of an "evil motive to injure " is *substantial* as well as clear and convincing, any award of punitive damages must be set aside. The Nevada Supreme Court has proclaimed that "fain award of punitive damages may not stand where the record lacks substantial evidence to support the required finding of 'oppression, fraud or malice, express or implied.' " *First Interstate Bank of Nevada v. Jafbros Auto Body. Inc.*, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990). In that case, the Court reversed an award of punitive damages despite the [18] fact that the evidence supported an inference that the defendant was negligent to the point of being unconscionably irresponsible. "Yet, *without substantial evidence of oppression. fraud or malice. even unconscionable irresponsibility will not sunport a punitive damages award.*" *Id.* at 57, 787 P.2d at 767 (emphasis supplied). Nevada's high court similarly reversed an award of punitive damages in *Craigo v. Circus-Circus Enter. Inc., supra*, because the court did "not perceive evidence of any intent by Circus-Circus to deliberately harm its patrons." 106 Nev. at 10, 786 P 2d 22, 28.

Finally, the *Craigo* Court stressed the pivotal distinction between *results* and *motives* that must be drawn when weighing liability for punitive damages:

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8. *See* footnote 7, *supra*

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> *A defendant's conduct may have an evil or injurious result. but no underlying evil motive to injure.* It is the evil motive to injure that must be shown directly or by inference as a predicate for a punitive award based upon malice. If the judicial course remains tethered to that compass, punitive verdicts should be limited to those actions that truly warrant state-imposed sanctions. *Persons who willfully intend to injure are deserving of the special monetary sanction that is desiQned to punish and deter. Others who, by their conduct. cause injury are held accountable in the forn of compensatory damages.*

106 Nev at 9 786 P.2d at 26-27 (emphasis supplied).

As shown below, the record in this case is devoid of substantial, clear and convincing evidence to prove that Joe Shoen acted with an "evil motive to injure" in taking the actions (along with the other Director Defendants) that the jury found to result in a breach of fiduciary duty.

[19] **B. Joe Shoen Took The Identical Actions As The Other Director Defendants, As To whom The Court Directed A Verdict On Punitive Damages**

The nucleus of the Dissident Shareholders' claim of breach of fiduciary duty was the actions taken by the AMERCO Board of Directors during the so-called "share issuance weekend" that occurred in July of 1988 — the issuance of the key employee stock, the establishment of the ESOP, and related acts. Those actions were taken *collectively* by Messrs. Johnson, Carty, Dodds, Paul F. Shoen, James P. Shoen and Joe Shoen — the six members of the AMERCO Board of Directors. *Each* member of the Board

approved *each* of the relevant actions. Yet on September 20, 1994, the trial court granted only a partial directed verdict on the punitive damages claim, ruling that under the Nevada standards discussed above, insufficient evidence had been adduced to state a claim for punitive damages as to any of those Director Defendants *except* Joe Shoen. *See* 9/20/94 a.m. Tr. at pp.4-16 (Exhibit 2 to Appellant's Appendix). Later, the trial court denied, with no explanation whatsoever, Joe Shoen's motion for judgment notwithstanding the verdict on the jury's award of punitive damages against him. *See* C.I. 1227 at pp 11-13 (Exhibit 8 to Appellant's Appendix).

Although Joe Shoen, acting as a member of the Board of Directors, bore responsibility for each of those July 1988 actions, *none* of the claimed breaches of fiduciary duty was taken by Joe Shoen acting alone. Thus, it would be wholly illogical to conclude that Joe Shoen was somehow acting with an "evil motive to injure" when he took the *identical* actions that the other Director Defendants took — actions that, as a matter of law, did not allow the other Directors to be subjected to punitive damages.

[20] This unreasonable disparity in the treatment of Joe Shoen is particularly evident in view of the fact that *all* members of the Board of Directors acted upon the same advice of counsel. The rule is well-established that where a defendant acts in good faith reliance on the advice of counsel, punitive damages will not lie. *See, e.g., Morgan Guaranty Trust Co. v. American Sav. & Loan Ass'n*, 804 F.2d 1487, 1500 (9th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987) (punitive damages not recoverable against party who acts in good faith under advice of counsel); *Angell v. Leslie*, 832 F.2d 817, 821(4th Cir. 1987) ("[W]hether the action of the individual defendant Leslie was correct or not, he acted at all times under the advice of the duly selected city anorney. This contradicts entirely any basis for a recovery of punitive damages. . . .")

(footnote omined); *Sheridan Comm. Park. Inc. v. Briggs*, 848 P.2d 811, 818 (Wyo. 1993) (reversing award of punitive damages); *Brearden v. John Hancock Mutual Life Ins. Co.*, 708 F. Supp. 1196, 1197 (D. Kan. 1987) (granting summary judgment for defendant on punitive damages).

The trial court recognized this precept, opining that "[t]he legal advice alone is probably enough to negate any allegation of malice aforethought on the part of the director defendants. 9/20/94 a.m. Tr. at p.9 (Exhibit 2 to Appellant's Appendix). Yet Judge Dunevant pointedly, and without justification, excluded Joe Shoen from the protection of the advice of counsel rule. "As I referred to them, when I say director defendants at this point, I am referring to everybody, except for Joe Shoen." *Id.*

It strains credulity to postulate that in taking the actions of July 1988, five of the Directors acted in good faith reliance upon counsel's advice while the sixth Director, having heard exactly the same advice and taken exactly the same actions, did so with "malice in fact." Significantly, there was no evidence that Joe Shoen anempted to iniluence the other Directors [21] improperly or that Joe Shoen's reliance upon the advice of AMERCO's legal counsel was not in good faith. In fact, the lawyer who advised the AMERCO Board of Directors in July of 1988 testified that Joe Shoen did not even take an active role in those Board meetings. 9/20/94 a.m. Tr. at pp.54-56 (Exhibit 18 to Appellant's Appendix).

Absent *substantial* and *clear and convincing* evidence that, in joining the other AMERCO Directors who took, on advice of counsel, the actions found to be breaches of fiduciary duty, Joe Shoen alone acted with an "evil motive to injure," the award of punitive damages is fatally defective.

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C. The Separate "Evidence" Relied Upon Is Too Remote In Time, Is Wholly Unconnected With The Breach Of Fiduciary Duty, And Is Not "Substantial," And Therefore Cannot Justify The Imposition Of Punitive Damages On Joe Shoen

Although the court below gave no explanation for denying the motion for judgment n.o.v. on punitive damages[9], the trial court previously, in denying a directed verdict on that issue as to Joe Shoen, had identified certain evidence[10] that supposedly differentiated him acting as a Director from the rest of the Director Defendants, as to whom the directed verdict was granted. The evidence cited, however, is insufficient to support an award of punitive damages under Nevada law. Not only is it generally too remote in time from the Board of Directors' actions of July 1988, but, more importantly, it is simply *not* clear and convincing evidence that Joe Shoen acted with the requisite "evil motive to injure" *when he took the actions the jury found to* [22] *constitute a breach of fiduciary duty*. That is the critical issue m determining liability for punitive damages.

Nevada law requires that there be a nexus between the conduct justifying punitive damages and the conduct that gave rise to the underlying liability. In other words, it is the doing of the wrongful conduct that must have manifested an "evil motive to injure." For example, the Supreme Court in *Caple v. Raynel Campers, Inc.*, 90 Nev. 341, 344, 526 P.2d 334.336 (1974), held that "[m]alice in fact sufficient to support an award of damages may be established by a showing that *the wrongful conduct* was willful, intentional

9. *See* C.I. 1227 at pp.11-13 (Exhibit 8 to Appellant's Appendix).

10. *See* 9/20/94 a.m. Tr. at pp.13-16 (Exhibit 2 to Appellant's Appendix).

and done in reckless disregard of its possible results." (emphasis supplied). More recently, the *Craigo* Court explained that "[a] defendant's conduct may have an evil or injurious result, but no underlying evil motive to injure." 106 Nev. at 9, 786 P.2d at 26. For this reason, "*[i]t is the evil motive to injure that must be shown* directly or by inference as a predicate for a punitive award based upon malice." *Id.* at 9, 786 P.2d at 26-27 (emphasis supplied).

The seminal role that this causal nexus plays in determining liability for punitive damages is apparent from the verdict form, which asked the jury:

> *Question No. 5*: Do you find by clear and convincing evidence that defendant Edward J. Shoen *has been guilty of* oppression. fraud or malice *through conduct. which forms the basis of a breach of fiduciary duty owed to the plaintiffs,* motivated by hatred and ill-will and the deliberate and evil intent to injure plaintiffs?
>
> ❒ Yes ❒ No

(C.I. 1177) (Exhibit 4 to Appellant's Appendix) (emphasis supplied). It is the conduct "which forms the basis of a breach of fiduciary duty owed to" the Dissident Shareholders that must evidence evil motive.

[23] Thus, for the punitive award to stand the Dissident Shareholders must have adduced evidence proving that, in taking the actions that constituted the alleged breach of fiduciary duty, Joe Shoen acted with malice in fact. Although the requisite mental state may be proven inferentially, that inference must somehow provide a link to the defendant's motive in doing the actions upon which liability is premised. Evidence showing direcdy or by inference

that Joe Shoen acted with an "evil motive to injure" in taking the steps in July of 1988 that the jury later deemed a breach of fiduciary duty is singularly absent from this record. The three categories of evidence on which the trial court relied in denying a directed verdict are simply insufficient.

The first evidence was the socalled "heir apparent" letter from Joe Shoen to his father, L.S. Shoen, concerning the latter's selection of Joe's siblings, instead of Joe, as L.S.'s successors. That letter, however, was written in October of 1982, almost *six years* before the events at issue. (Trial Exhibit No.13 (Exhibit 13 to Appellant's Appendix); *9/20/94* a.m. Tr at p.14 (Exhibit 2 to Appellant's Appendix).) Joe's mental state in July of 1988 cannot be inferred from evidence that is so far removed in time from the pertinent events. For example, in *Campbell v. Bartlett*, 975 F.2d 1569, 1582-83 (10th Cir. 1992), the Tenth Circuit upheld a directed verdict for the employer on the issue of punitive damages where the supporting evidence — information in the employee-driver's personnel file — was too remote in time from and was unconnected with the accident at issue. *See also Guibranson v. Duluth. Missabe & Iron Range Railway Co.*, 921 F.2d 139, 142 (8th Cir. 1990) (meeting minutes taken *eight months* after the pertinent event irrelevant to show defendant's knowledge at time of accident).

Even more significant is the content of the heir apparent letter itself. In that letter, Joe Shoen says things such as "[y]ou have my never ending respect as my father, as a great [24] organizational talent." (Trial Exhibit 13 at p. 1 (Exhibit 13 to Appellant's Appendix).) That is hardly the stuff of which evil motives are made. And, of course, the content of the letter has nothing at all to do (nor could it) with events that would not transpire until almost six years later in connection with the share issuance weekend. No reasonable person could conclude that this lener supports the jury' 5 award of punitive damages against Joe Shoen.

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The second piece of evidence referenced by the trial court involved Joe Shoen's concern over the fact that his children, then aged 9 and 11, were being served with process. *See* 9/20/94 a.m. Tr. at pp.14-li (Exhibit 2 to Appellant's Appendix). The May 12, 1989 letter (Trial Exhibit 221) (Exhibit 14 to Appellant's Appendix) to which the trial judge referred, however, was written by Stephen S. Case, *not* by Joe Shoen. Moreover, the trial court had previously *refused to admit Mr. Case's letter into evidence* on the ground that it was hearsay. *See* 9/14/94 first p.m. Tr. at pp.4849 (Exhibit 17 to Appellant's Appendix). It is axiomatic that inadrnissible hearsay cannot form a lawful basis for the irnposition of punitive damages. *Cf. State v. Valera*, 74 Haw. 424, 430-31, 43940, 848 P.2d 376, 379, 383 (1993) (vacating sentence because trial court relied in part upon inadmissible statements of defendant that court had previously suppressed). In addition, that letter concerned events that transpired *10 months after*, and were wholly unrelated to, the Board's actions of July, 1988.[11] In sum, nothing in Mr. Case's letter constitutes any evidence, much less substantial, clear and convincing evidence, of what motivated Joe Shoen during the critical July 1988 time period.

[25] Finally, the trial court also cited to Joe Shoen's speech and conduct in relation to his father, L.S. Shoen, and his brother, Sam Shoen, as evidence that would allow the punitive -damage claim to go to the jury. *See* 9/20/94 a.m. Tr. at pp.14-15 (Exhibit 2 to Appellant's Appendix). Once again, however, the record is simply devoid of the quantum of clear and convincing evidence that is necessary to prove that Joe Shoen acted with an "evil motive to

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11. Further, Mr. Case testified that his statement in the letter that Joe Shoen "would raake life as difficult as possible" was an exaggeration. All that Mr. Case was referring to by the term "life" was the stock registration transaction then at issue ~ 9/14/94 first p.m. Tr. at pp.4445 (Exhibit 17 to Appellant's Appendix).

injure" when he, upon the advice of counsel, took the same actions as the other Directors at the time of the share issuance weekend. Admittedly, relations among various of the Shoen family members are less than close. Over the years, family relationships have been characterized by a series of shifting alliances and factions. Indeed, there is evidence in the record of altercations among the Dissident Shareholders themselves. *See, e.g.*, punching incident between Mike Shoen and Sam Shoen (9/7/94 a.m. Tr. at pp.34-35 (Exhibit 16 to Appellant's Appendix)). *This general lack of family harmony, however, does not translate into the requisite 'evil motive to injure" with respect to the actions taken by Joe Shoen and the other Directors in July of 1988.*

It is not enough simply to show that Joe Shoen did not get along with his father or some of his siblings as a general matter. After all, family disputes are neither uncommon nor of recent origin. The Old Testament is replete with stories of sons vying for the favor of their father and of quarrels between brothers *See, e.g.*, *Genesis* 27:1-46 (Jacob scheming to supplant brother Esau in the eyes of their father, Isaac); *Genesis* 37:1-36 (Joseph sold into slavery by his brothers). The Shoen family discord that waxed and waned here of course, is hardly of biblical proportions. Nor, more importantly, is such discord even relevant. What Nevada's concept of malice in fact requires is that the Dissident Shareholders prove, by substantial, clear and convincing evidence, [26] that this Director Defendant was motivated by an evil intent to injure *in taking the actions that constitute the alleged breaches of fiduciary duty.*

The only speech or conduct by Joe Shoen concerning L.S. Shoen or Sam Shoen that took place at about the time of the July, 1988 AMERCO Board actions was an incident at a shareholders' advisory committee meeting held on July 16, 1988, in which Joe Shoen looked at Sam's notes and exclaimed that Sam was going to

sell the company. *See* 8/31/94 p.m. Tr. at pp. 29-31 (Exhibit 15 to Appellant's Appendix). What this evidence demonstrates is that Joe Shoen had a very good basis for believing that there was a threat to the company in July of 1988, and that he and the other Directors were fully justified in relying on the advice of AMERCO's counsel and taking certain of the actions that counsel had recommended to protect the company. In short, this evidence shows that during the share issuance weekend Joe Shoen was motivated by a desire to protect AMERCO from harm, *not* by an evil motive to harm the Dissident Shareholders.[12]

The fact is that all of the disagreements between Joe Shoen and his father and brothers invariably concerned business disputes — *i.e.*, differences of opinion about how the business of AMERCO should be conducted. Those disputes centered on contrasting business philosophies — not personalities. Certainly, one may disagree about how to operate a business without being subjected to liability for punitive damages. The absence of substantial, clear and [27] convincing evidence of any malice in fact that is related to Joe Shoen's actions as a member of the Board of Directors in July of 1988, vitiates the award of punitive damages.

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12. The Dissident Shareholders will no doubt cite to evidence in the record concerning incidents between Joe Shoen and his father and siblings in addition to those discussed above. That is hardly surprising, as this was a seven-week trial in which several of the Dissident Shareholders were permitted to tell the jury virtually their entire life stories. Such additional incidents are irrelevant, however, because they are too remote in time and wholly unrelated to the events that constituted the breach of fiduciary duty by the Board of Directors found by the jury. Thus, such evidence does not bear on the issue of Joe Shoen's mental state for purposes of imposing punitive damages.

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D. The Trial Court's Remittitur Demonstrates Its Recognition That The Verdict Was Defective

Although the trial judge failed to give even a word of explanation for denying the motion for judgment n.o.v. on punitive damages, his grant of a remittitur of the punitive award from $70,000,000 to $7,000,000 confirms the fact that he had grave misgivings about the jury's verdict. *See* C.I. 1227 at pp.11-13 (Exhibit 8 to Appellant's Appendix). There is no question that, under Nevada law, the remittitur was both proper and constitutionally required *assuming that there was a sufficient evidentiary basis to support an award of punitive damages in the first place. See* C.I. 1190 and 1216 (Exhibits 5 and 7 to Appellant's Appendix). Reducing the amount of punitive damages, however, cannot be used as a substitute for the searching post-trial examination of the record that is necessary after a timely motion for judgment n.o.v. to determine whether there was substantial, clear and convincing evidence to justify imposing *any* punitive damages under Nevada's strict standards. Where, as here, there is simply no evidence of an "evil motive to injure" with respect to the actions constituting a breach of fiduciary duty — actions taken by Joe Shoen in concert with all of the other Director Defendants and upon the advice of counsel -~ a punitive damages award of even one dollar, let alone $70 million, would be legally defective and must be set aside.

Unfortunately, after reviewing the record, one is left with the suspicion that the jury assessed punitive damages *not* to punish Joe Shoen because of any breach of fiduciary duty, but simply because the jurors found his father and siblings who comprise the Dissident Shareholders group to be the more likable characters in the family drama. Joe Shoen's failure to win a popularity contest with the jury, however, cannot be the basis for imposing punitive damages. The trial court was therefore required to enter judgment n.o.v. on the punitive damages claim as a matter of law.

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IV. *CONCLUSION*

Because the record is devoid of substantial, clear and convincing evidence that, when the AMERCO Board of Directors took the actions the jury found to constitute a breach of fiduciary duty, Director Joe Shoen alone acted with an "evil motive to injure" the Dissident Shareholders, the award of punitive damages cannot stand as a matter of law. This Court should therefore vacate the judgment below and remand with directions that judgment be entered in favor of Joe Shoen on the punitive damages claim.

RESPECTFULLY SUBMITTED this 20th day of November, 1996.

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No. 98-86

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EDWARD J. SHOEN,
Petitioner,

v.

SAMUEL W. SHOEN, CECILIA M. SHOEN-HANLON, THERESA SHOEN-ROMERO, KATRINA M. SHOEN-CARLSON, MICHAEL L. SHOEN, LEONARD S. SHOEN, SAMWILL, INC., CEMAR, INC., KATTYDID, INC., THERMAR, INC., MICKL, INC., AND L.S.S., INC.,
Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' Brief in Opposition ("Opp.") does not challenge the importance of the legal issues raised by the punitive damages award entered against petitioner Edward J. ("Joe") Shoen, or take serious issue with the reasons certiorari should be granted here, but instead argues that the punitive damages award is justified based on the particular facts of this case. Respondents' "factual" recitation, however, overlooks the central inescapable circumstance here: that petitioner alone was held liable for $7 million in punitive damages when his only *sanctionable* conduct—casting his vote as one of six members of the AMERCO board of directors—was identical to that of, and taken collectively with, the five other board members. Respond-

ents' factual recitation only serves to reinforce the importance of constraining the discretion of a jury to ensure that awards of punitive damages are based on the legitimate purpose of "punishing *unlawful conduct* and deterring its repetition," *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 568 (1996) (emphasis supplied), rather than on "the biases and prejudices of individual jurors," who, in the absence of proper limits, may "target [an] unpopular defendant[ ] and punish [him] selectively." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 63 (1991) (O'Connor, J., dissenting). The punitive damages award against Joe Shoen resulted from a jury that was allowed to exercise its discretion so as to impose punitive damages against Joe Shoen alone even though his conduct, by itself, could not have caused the damages asserted by the plaintiffs. The punitive damages award here raises important and unsettled issues of due process and equal protection which respondents fail to address and which should be considered by this Court.

1. As explained in the Petition, this Court has required that there be a connection between the award of compensatory damages and any award of punitive damages, to ensure that juror discretion is properly constrained so as to comport with the Due Process Clause. Pet. at 12-13. Respondents do not deny the importance of such a connection, and do not dispute that an issue under the Due Process Clause is raised where the conduct supporting an award of punitive damages could not by itself support any award of compensatory damages. As the Alabama Supreme Court has aptly explained in a case decided since the Petition was filed, "[i]n this era following *BMW of North America* v. *Gore* * * * closer scrutiny of the relationship between compensatory damages and punitive damages is necessary." *Life Ins. Co. of Ga.* v. *Smith*, Nos. 1951773 to 1951777, 1951795 to 1951799, 1998 WL 397468, at *9 (Ala. July 17, 1998) (per curiam) (holding that punitive damages may not be imposed in the absence of an award of compensatory or

nominal damages). Similarly here, the punitive damages award was not based on any award of compensatory damages against Joe Shoen individually. Accordingly, closer scrutiny of the punitive damages award is required because the award of punitive damages is an infinite multiple of the amount of compensatory damages that could have been awarded based on petitioner's conduct, standing alone.

2. Because respondents' argument fails to come to terms with the fact that Joe Shoen's liability for breach of fiduciary duty was based on actions taken collectively and unanimously by the six-member board, respondents have no reply to petitioner's argument that due process is violated where a single individual is made liable for punitive damages based on conduct that was neither necessary nor sufficient to cause the harm allegedly suffered. Pet. at 13-14. While respondents argue that petitioner's actions caused them harm, Opp. at 18, they fail to connect any of Joe Shoen's individual conduct to the legally cognizable injury they suffered—the decrease in value of their stock due to the unanimous and collective conduct by the board.[1] Accordingly, respondents take no issue with petitioner's argument that certiorari should be granted so that this Court may determine whether a jury's discretion in awarding punitive damages is sufficiently constrained where the jury is allowed to award punitive damages against a single individual whose conduct, in the absence of identical, collective conduct by the other defendants, could not be the legal cause of the cognizable injuries suffered by the plaintiffs.

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[1] The Arizona Court of Appeals concluded, based on the arguments of the parties, that the events of the weekend of July 24, 1988 were the primary basis for respondents' claims, and particularly for the computation of damages. Pet. App. 11a. Neither the Court of Appeals nor respondents detail any other actions by Joe Shoen alone that could even arguably result in the diminution in the value of respondents' stock, which is the harm they alleged below as well as in their Opposition. Opp. at 20.

3. Respondents' factual recitation also fails to come to grips with the basis on which the punitive damages award was affirmed by the Arizona Court of Appeals. That court held that "[i]t is immaterial whether Joe took the same actions as the other defendants because the issue is whether those actions were taken with the requisite state of mind." Pet. App. 11a. While respondents provide details of Joe Shoen's allegedly malicious state of mind, they do no better than the courts below did in linking any of that "evidence" to the legally sanctioned conduct below: Joe Shoen's collective action with the entire board of directors.[2] Once again, respondents do not dispute that an issue worthy of certiorari is raised where an award of punitive damages is entered against a defendant based on his state of mind, completely dissociated from any sanctionable conduct. Here, where liability for compensatory damages was based on the action of the board as a whole, it should be the motive of the *board* that is operative in determining the propriety of punitive damages, not the motive of a single member.

4. Respondents further assert that review is not necessary here because Nevada follows the majority rule of allowing punitive damages to be issued against one joint tortfeasor and not another. Opp. at 15-17. Respondents, however, fail to cite a single case, other than the opinion below, where such a rule has been used to justify an award of punitive damages against one of a group of joint tortfeasors whose liability was based on an identical

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[2] In fact virtually every action detailed by respondents on over three pages of the Opposition as "the wrongs alleged at trial" was taken not by petitioner alone, but by the board as a whole. Opp. at 4-7. Moreover, contrary to the respondents' assertions in, among other places, the Questions Presented section of the Opposition, there was no finding by the courts below that petitioner "caused other directors to take actions that constituted breaches of fiduciary duty." *See, e.g.*, Opp. at i; Pet. App. 11a.

collective action taken by all members of the group. *See* Pet. at 14-15.

5. Respondents are incorrect to argue that petitioner has waived his equal protection claim by failing to raise it in the trial court.[3] Pursuant to Arizona law, "[q]uestions of constitutional guarantees and violations thereof may be raised for the first time on appeal." *Gosewisch* v. *American Honda Motor Co.*, 737 P.2d 376, 382 (Ariz. 1987) (citation omitted). As explained in the Petition, petitioner raised his equal protection claim by arguing to the Arizona Court of Appeals that singling him out from the other directors would violate the principle established in *BMW of North America, Inc.* v. *Gore*, 517 U.S. at 568-569. Pet. at 7. The equal protection claim was raised again in the petition for review before the Arizona Supreme Court, without objection by the respondents. Petition for Review at 12-13.

6. The legitimate state interest served by punitive damages awards—"punishing unlawful conduct and deterring its repetition"—is in no way furthered by the punitive damages award here. *BMW*, 517 U.S. at 568. Shoen's "unlawful conduct" was his vote as a member of the board of the directors, but what the punitive damages award was based on—fractious family relations—was not unlawful. This Court should grant certiorari to determine whether equal protection is violated where a jury is allowed to single out one individual—based on his intra-familial relationships—for an award of punitive damages, where the individual's unlawful conduct is a collective identical action of a group.

7. Respondents do not dispute that further guidance to the lower courts on the issues raised by the punitive damages award here is necessary, and furthermore do not

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[3] Respondents concede that petitioner's due process claims were adequately raised below. Opp. at 11, 19.

dispute that such guidance in a business-related case would be particularly appropriate. *See* Pet. at 20-21. Respondents' factual arguments against certiorari are far afield from the legal issues raised by the instant award of punitive damages and do not detract from the importance of those issues.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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